Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

BOBBY HATHCOCK,
Petitioner,

v.

ACME TRUCK LINE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTION PRESENTED

Federal statutes assess social security (FICA) and unemployment (FUTA) taxes against an employer and prohibit the employer from recouping those taxes from the employee. State unemployment compensation statutes (SUTA) have similar provisions. Acme Truck Line, Inc. ("Acme"), a trucking company, has devised a scheme by which it leases a truck from the owner, employs the owner to drive the truck, and pays employment taxes on the owner's wages. (App. 25a.) However, as part of the lease agreement, (App. 26a), Acme then requires the owner to reimburse it for the taxes it pays on the owner's wages. Bobby Hathcock ("Hathcock") is one of those lessor/drivers. The District Court and the Court of Appeals found no fault with this arrangement. Thus, the case presents the following issue:

> Can an employer circumvent federal and state statutes, which impose social security and unemployment taxes solely on an employer, by leasing equipment from a person and employing the person to use the equipment, then deducting from the person's lease payment the social security and unemployment taxes paid because of the person's employment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 6
REASONS FOR GRANTING THE WRIT 9
CONCLUSION 17
APPENDIX
CIRCUIT COURT OPINION 1a
CIRCUIT COURT ORDER 13a
DISTRICT COURT OPINION 14a
DISTRICT COURT ORDER 23a
ORDER DENYING REHEARING 24a
LEASE AGREEMENT 25a

TABLE OF AUTHORITIES

CASES

BOBBY HATHCOCK V. ACME TRUCK LINE, INC., _F.3D_ (5TH CIR. 2001) (2001 WL 946407 1

DVORAK V. CELEBREZZE, 345 F.2D 894 (10TH CIR. 1965) 12

HELVERING V. DAVIS, 301 U.S. 619 (1937) 13

IN RE RICHARDSON DINNER THEATRE, INC., 421 F.SUPP. 423 (N.D. TEX. 1976) 13

LEGGETT V. MISSOURI STATE LIFE INS. CO., 342 S.W.2D 833 (MO. 1960) 12

MATHEWS V. DE CASTRO, 429 U.S. 181 (1976) 12

SOCIAL SEC. BD. V. NIEROTKO, 327 U.S. 358 (1946) 11, 13

U.S. V. STATE OF NEW YORK, 315 U.S. 510 (1942) 10

STATUTES

26 U.S.C. § 3101, 3311 12

26 U.S.C. § 3111 2

26 U.S.C. § 3301 ..... 1, 13, 14

26 U.S.C. § 3306(C) 13

26 U.S.C. 3301 11

26 U.S.C. 3301, 3111 11

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1331, 1332 6

42 U.S.C. § 1101(B) 12

42 U.S.C. 407 11

LA. REV. STAT § 23:1531(A) 16

LA. REV. STAT. § 23.1691 16

LA. REV. STAT. § 23:1531 5

LA. REV. STAT. § 23:1532 ..... 5, 16

LA. REV. STAT. § 23:1691 5

REV. STAT. § 23:1691 11

SOCIAL SECURITY ACT, 42 U.S.C. § 401 11

TEX. LABOR CODE § 204.002 3

TEX. LABOR CODE § 204.003 4

TEX. LABOR CODE § 207.071 4

TEX. LABOR CODE § 207.071(B) 11

TEX. LABOR CODE § 207.072 4

TEX. LABOR CODE § 207.073 4

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit upon which the petition is based, *Bobby Hathcock v. Acme Truck Line, Inc.*, _F.3d_ (5th Cir. 2001) (2001 WL 946407), is copied in the Appendix at App. 1a.

The unpublished opinion and Order of the United States District Court for the Southern District of Texas in *Bobby Hathcock v. Acme Truck Line, Inc.*, is copied in the Appendix at App. 14a.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 6, 2001 (App. 1a.) Petitioner's Motion for Panel Rehearing was denied on October 3, 2001. (App. 24a.) This petition for writ of certiorari is filed within 90 days of the denial of the petition for rehearing. U.S. SUP. CT. R. 13.3.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 26 U.S.C. § 3301

§ 3301. Rate of tax:

There is hereby imposed on every employer (as defined in section 3306(a)) for each calendar year an excise tax, with respect to having individuals in his employ, equal to–

(1) 6.2 percent in the case of calendar years 1988 through 2007; or

(2) 6.0 percent in the case of calendar year 2008 and each calendar year thereafter;

of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

2. 26 U.S.C. § 3111

§ 3111. Rate of tax:

(a) Old-age, survivors, and disability insurance.–In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))–

In cases of wages paid during: The rate shall be:

1984, 1985, 1986, or 1987 . . . . . 5.7 percent
1988 or 1989. . . . . 6.06 percent
1990 or thereafter . . . . . 6.2 percent.

(b) Hospital insurance.–In additional to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))–

(1) with respect to wages paid during the calendar years 1974 through 1977, the rate shall be 0.90 percent;

(2) with respect to wages paid during the calendar year 1978, the rate shall be 1.00 percent;

(3) with respect to wages paid during the calendar years 1979 and 1980, the rate shall be

1.05 percent;

(4) with respect to wages paid during the calendar years 1981 through 1984, the rate shall be 1.30 percent;

(5) with respect to wages paid during the calendar year 1985, the rate shall be 1.35 percent; and

(6) with respect to wages paid after December 31, 1985, the rate shall be 1.45 percent.

(c) Relief from taxes in cases covered by certain international agreements.–During any period in which there is in effect an agreement entered into pursuant to section 233 of the Social Security Act with any foreign country, wages received by or paid to an individual shall be exempt from the taxes imposed by this section to the extent that such wages are subject under such agreement to taxes or contributions for similar purposes under the social security system of such foreign country.

3. TEX. LABOR CODE § 204.002

§ 204.002. Contribution Required:

(a) An employer shall pay a contribution on wages for employment paid during a calendar year or the portion of the calendar year in which the employer is subject to this subtitle.

(b) The contribution shall be paid to the commission in accordance with rules adopted by the commission.

4. TEX. LABOR CODE § 204.003

§ 204.003. Contribution Not Deducted From Wages:
An employer may not deduct any part of a contribution from the wages of an individual in the employer's employ.

5. TEX. LABOR CODE § 207.071

§ 207.071. Waiver, Release, or Commutation Agreement Invalid:
(a) Except for an employer's waiver under Chapter 204 and Section 205.011, an agreement by an individual to waive, release, or commute the individual's right to benefit or any other rights under this subtitle is not valid.
(b) An agreement by an individual employed by an employer to pay all or a portion of a contribution or reimbursement required to be paid by the employer under this subtitle is not valid.

6. TEX. LABOR CODE § 207.072

§ 207.072. Acceptance or Requirement of Waiver Prohibited:
An employer may not require or accept a waiver of a right of an individual employed by the employer.

7. TEX. LABOR CODE § 207.073

§ 207.073. Prohibited Deduction From Wages:
An employer may not, directly or indirectly, make, require, or accept a deduction from wages to finance a contribution or reimbursement required to be paid by the employer under this subtitle.

8. **LA. REV. STAT. § 23:1531**

(a) Contributions shall accrue and become payable be each employer for each calendar year in which he is subject to this Chapter with respect to wages for employment. These contributions shall become due and be paid by each employer to the administrator for the fund in accordance with such regulations as the administrator may prescribe, and shall not be deducted, in whole or in part, from the wages of individuals in the employer's employ.

9. **LA. REV. STAT. § 23:1532**

Each employer shall pay contributions equal to two and seven-tenths percentum of wages paid by him during each calendar year."

10. **LA. REV. STAT. § 23:1691**

(a) No agreement by any individual in the employ of any person or concern to pay all or any portion of the employer's contribution, required under this Chapter, from such employee, shall be valid. No employer shall directly or indirectly make or require or accept any deduction from wages to finance the employer's contributions required from him, require or accept any waiver or rights hereunder by any individual in his employ.

(b) An employer or officer or agent of an employer who violates any provision of this Section shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not less than one month nor more than six months, or both.

STATEMENT OF THE CASE

The suit was filed by Hathcock in the state court in Harris County, Texas and removed by Acme to the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. §§ 1331, 1332, and 1337(a). After the District Court granted summary judgment for Acme, (App. 14a), Hathcock appealed the judgment to the United States Court of Appeals for the Fifth Circuit. That court affirmed the judgment of the trial court. (App. 1a.) The suit is based upon the following facts.

1, **Hathcock leased his truck to Acme**. - Acme is a trucking company that owns no trucks but leases vehicles from others and often uses the owners to drive the leased trucks and deliver the products transported by Acme. In July of 1996, Hathcock leased his 1990 Ford F-250 truck to Acme for five years by a document executed by both parties styled "Lease Agreement." (App. 25a.) The lease contained the following terms of payment to Hathcock:

> 3. As consideration for the use of the Leased Equipment, as herein provided, Lessee agrees to pay Lessor seventy (70%) percent of the "Earned Revenue derived by the Lessee from the Leased Equipment," as defined herein, less driver's wages; payroll taxes (including FICA and other deductions); cost of medical or hospitalization insurance, if applicable; pre-employment driver application information costs, including cost of obtaining motor vehicle driving record; cost of pre-employment driver medical examinations, testing and screening; cost of driver medical examinations, testing and screening, including driver drug testing, screening, medical evaluations and consultations, and biennial medical examinations as may be required by the U.S. Department of Transportation, Federal Highway Administration or any other

> governmental body, and such other costs or payments made by Lessee by reason of driver employment, and less any "Operating costs and expenses," and other charges hereinafter provided, which are incurred by Lessee in connection with the use and/or operation of the Leased Equipment and for which Lessor shall be responsible.

(App. 26a.)

The quoted paragraph is the source of this controversy. The Court will observe that Acme (as lessee) agreed to pay to Hathcock (as lessor) 70% of the revenue earned by the truck, "less driver's wages; payroll taxes (including FICA and other deductions); cost of medical or hospitalization insurance" and various other expenses incurred by Acme "by reason of driver employment." Relying on paragraph 3, Acme deducted from Hathcock's 70% payment a sum equal to 23% of the driver's wages. Acme represented to Hathcock that the 23% deduction was to cover Social Security (FICA), Federal Unemployment (FUTA), and State Unemployment (SUTA) taxes and worker's compensation expenses for the truck's driver.

2. Hathcock drove his truck for Acme. - During the term of the lease, Hathcock drove the truck he had leased to Acme and delivered items for Acme. The process by which he was paid, and occupied the position of driver of his own vehicle is rather convoluted, however. After a lessor, such as Hathcock, leases a vehicle, he decides who will drive it, either by recruiting the driver or by exercising veto power over a driver recruited by Acme. Hathcock, as lessor, also sets the driver's wages at between 10% and 25% of the gross 70% lease payment due to the lessor. Hathcock, as lessor, also provides numerous other benefits for the driver.

Hathcock selected himself as the driver and set his salary at 10% of the gross amount he was entitled to receive as lessor.

Under that arrangement, Hathcock received two checks from Acme. One check was for his services as a driver of the truck. That check was in the gross sum of 10% of 70% of the gross amount earned by the truck. From that amount, Acme deducted federal taxes and state taxes, and Hathcock received the balance.

The second check Hathcock received was the lease payment. The gross amount of that check was based on 70% of the revenue earned by the truck. From that 70%, Acme deducted the wages paid to Hathcock and an additional amount set by Acme at 23% of the amount of the driver's wages, for (1) FICA, (2) FUTA, and (3) SUTA taxes and (4) Worker's Compensation expenses.

Thus, Acme deducted the 23% from money it owed Hathcock as lessor to pay taxes it owed because it treated Hathcock as an employee. Acme collected this money from Hathcock even though it was fully aware that the taxes were its responsibility under the law.

Also, although Acme told the drivers that the collection was for the taxes, it continued to deduct money from the lessor's share for taxes even after it had paid all of the taxes it was required to pay.

Under any view of the evidence, Acme was using Hathcock's money to pay taxes it owed and, had he earned more than the taxable maximum, it would have continued to take money from him for those taxes when it no longer owed them. Whether it can do so under state and federal law is the crux of this lawsuit.

REASONS TO GRANT THE WRIT

Introduction

The federal and state FICA and FUCA/SUCA statutes are worded and designed to place on an employer responsibility for the taxes the statutes assess. All of the statutes either expressly or impliedly prohibit the employer from recouping the taxes from the employee. Acme and other trucking companies are evading the words and intent of the statutes by doing indirectly what they cannot do directly, and their scheme is eviscerating the statutes. For the following reasons, this Court should address the problem and stop the scheme.

1. The case presents an important question of federal law that should be settled by this Court. - The Fifth Circuit has approved a plan that allows an employer to lease an asset from an employee, use the asset in the business, then collect from the employee the FICA and unemployment taxes paid on the employee. The Supreme Court should address this problem now, for four reasons.

First, numerous cases that challenge the scheme are pending in Texas and Louisiana including the following:

> Cause No. E-161,158; *William Lloyd Bridges v. Andrews Transport, Inc.*; In the 172nd Judicial District for Jefferson County, Texas
>
> Case No. 09-01-00477-CV; *Bridges v. Andrews Transport, Inc.*; In the Court of Appeals for the Ninth District of Texas
>
> Cause No. 97-44489; *Evans v. Dynasty Transportation, Inc.*; In the 281st Judicial District Court of Harris County, Texas
>
> Case No. 13-00-00615-CV; *Charles Evans v. Dynasty Transportation, Inc.*; In the Court of Appeals for the

Thirteenth District of Texas

Case No. 6:00-2365; *Sammie Don Jones v. Transport Holdings, L.L.C.*, In the U.S. District Court for the Western District of Louisiana

There may be more cases pending elsewhere in the United States.

Second, the erroneous Fifth Circuit opinion will be cited as precedent and trucking companies will continue to obtain back door reimbursement for taxes that are their sole responsibility. The wrong is compounded because the employee pays both sides of the tax but cannot deduct either side from his own tax liability.

Third, other companies will adopt the same kind of scheme, now that the Fifth Circuit has validated it. With the Fifth Circuit opinion to guide it, every employer can do exactly what Acme is doing. Hathcock leased his second-hand, worn out, low value pickup truck to Acme. Another employer can require the potential employee to "lease" something else—a desk, a pencil, a hammer, a law book, or a pair of shoes—then hire that person to sit at the desk, work with the pencil, hammer, or law book, or wear the shoes to call on customers. Like Acme, the employer can pay the person a percent of the revenue the person generates, as a lease payment for the item, but deduct from the lease payment the taxes, insurance, and other "employee expenses" paid because the person is an employee. Thus, the employer can recoup the taxes assessed against it because of its employment of the same person from whom it is recouping the taxes.

Fourth, the companies that use this scheme are working both sides of the street. They receive tax credits for these taxes, *U.S. v. State of New York*, 315 U.S. 510, 515 (1942), then collect from the employee the same taxes for which they are given credit.

The FICA and FUTA/SUTA statutes become meaningless if this scheme is permissible, because it violates the purpose of FICA and FUTA/SUTA in two ways. First, it allows the employer to escape the share Congress said it should pay. It is crystal clear that Congress intended for the employer to pay its share without reimbursement from the employee. 26 U.S.C. 3301; 42 U.S.C. 407. Also, because the salary is minuscule in most cases, the employee will not pay for or receive maximum or even significant FICA or FUTA/SUTA benefits, thus adding to the general public's tax burden for medical care and other welfare costs, a burden the statutes were designed to prevent. *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 364 (1946).

If the scheme is legal, this Court should say so and settle the issue now. If it is illegal, the Court should say so and stop this evasion of clear Congressional intent.

2. The Court of Appeals committed a serious error. - There are two indisputable facts in this case. First, the laws of the United States, Texas, and Louisiana prohibit an employer from being reimbursed by the employee, directly and indirectly, for the employer's share of FICA, FUTA, and SUTA taxes. 26 U.S.C. 3301, 3111; TEX. LABOR CODE § 207.071(B); LA . REV. STAT. § 23:1691. Second, Acme is obtaining reimbursement from Hathcock, its employee, for Acme's share of FICA, FUTA, and SUTA taxes assessed because of Hathcock's employment. (App. 26a.) Acme and the Fifth Circuit justify the scheme by saying Hathcock is Acme's employee when being paid for driving his truck but not when being paid for allowing Acme to allow him to use his truck. Hathcock suggests that the Fifth Circuit opinion is wrong, and that Acme is violating the letter and the spirit of the pertinent statutes and the public policy behind them, for the following reasons.

a. The employer must pay its share of the FICA tax. - The Social Security Act, 42 U.S.C. § 401 et. seq. establishes a federal program for the benefit of the aged, blind and disabled and their dependents. FICA imposes a tax

on both employees and employers that is measured by the amount of wages paid with respect to employment. 26 U.S.C. § 3101, 3311; 42 U.S.C. § 1101(b). Social Security taxes are excise taxes imposed upon employers for the privilege of employing persons. See *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833 (Mo. 1960). The rationale is simple: For every dollar amount of labor consumed by an employer, it is required to commit an amount of money in the form of a tax earmarked for the laborer during times of retirement or disability.

Numerous courts have recognized the important and overwhelming public policy interest which brought about the existence of the Social Security Act. A common judicial conclusion is that the Social Security Act is intended to ameliorate some of the rigors of life for those who are impoverished or disabled. *Dvorak v. Celebrezze*, 345 F.2d 894, 897 (10th Cir. 1965). Another is that the Act's primary objective is to provide workers and their families with the basic protection against hardships created by loss of earnings due to illness or old age. *Mathews v. De Castro*, 429 U.S. 181, 186 (1976).

The public importance of the Social Security Act is sharply defined by the words printed on the face of the Act itself. The preamble introducing the Act states that it is intended:

> "... to provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, dependant and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws ...." S. Rep. No. 74-628, 1st Sess. 3-4 (1935).

Each benefit provided for under the Act is structured by Congress to be paid for by both the employer and the employee. This Court has said that the "purpose of the Federal Old Age Benefits of the Social Security Act is to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor." *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 364 (1946). *Accord: Helvering v. Davis*, 301 U.S. 619, 641 (1937); H.R. Rep. No. 76-728, 1st Sess. 3-4 (1937); S. Rep. No. 76-734, 1st Sess. 3-4 (1937). Here, however, Hathcock has been required to pay both the employer's and the employee's contribution for FICA. Benefits flowing to Hathcock under the Act have been directly diminished by the doubling of the costs of those benefits to him. By forcing him to pay both components of the amounts required by law, Acme has decreased his benefits while creating an innovative windfall profit center for itself. Acme escapes all of the financial burden imposed upon it by law and, by shifting that burden to Hathcock, enhances its own market competitiveness by having a lower cost of doing business.

An analogous case illustrates the error. In *In re Richardson Dinner Theatre, Inc.*, 421 F.Supp. 423 (N.D. Tex. 1976), an employer in bankruptcy argued that the employee should pay both halves of the FICA tax. The Court rejected the argument because it "flies in the face of statutory intent that the employee should only partially finance the benefits of the system." *Id.* at 425-26. The court went on to say that "a court should be loath diminish this limited protection by a . . . reading . . . which lessens the worker's" statutorily defined benefits. *Id.* It is clear that Acme's scheme violates the intent and purpose of the Social Security Act.

b. The employer must pay the FUTA tax. - FUTA is a federal tax collected and used to benefit employees during temporary periods of unemployment. 26 U.S.C. § 3301. To finance unemployment benefits, FUTA imposes a tax only on employers for employees engaged in certain categories of employment. 26 U.S.C. § 3306(c).

Deductions for an employer's contribution to FUTA from an employee's compensation is in violation of the Federal Unemployment Compensation Act. Specifically, 26 U.S.C. § 3301 states "[t]here is hereby imposed on every employer (as defined in section 3306(a) for each calendar year an excise tax, with respect to having individuals in his employ ..." (emphasis added). By its scheme, Acme is also illegally shifting the imposition of this tax to Hathcock. Hathcock simply has no liability for FUTA taxes and hence the deductions are patently and purposefully unlawful. Judicial approval of the scheme will, of course, have the consequences outlined above. There will be a fire storm of activity by employers as they draft lease agreements to make employees into two-headed cash cows.

c. The employer must pay the SUTA taxes. - Texas enacted its SUTA law in 1935. Tex. S. Con. Res. 5, 44th Leg., 3rd Sess. (1935). When the Texas Legislature passed the original SUTA law, the intent mirrored Congress' intent to provide an orderly system of contributions for the care of the unemployed during times of economic difficulty. The original SUTA stated the "contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Act." Chapter 482, sec. 7, Tex. S. Con. Res. 5, 44th Leg., 3rd Sess. (1935). With uncanny wisdom and foresight, the Texas Legislature anticipated the very conduct engaged in by Acme in this case when it enacted the Texas Unemployment Tax Act. To protect the rights and benefits of employees, the original Texas SUTA provided that "no employer shall directly or indirectly make or require or accept any deduction from wages to finance the employer's contributions required from him." Chapter 482, sec. 15(a), Tex. S. Con. Res. 5, 44th Leg., 3rd Sess. (1935). (Emphasis added).

Section 204.002(a) of the Texas Unemployment Compensation Act provides that "... an employer shall pay a contribution on wages for employment pay during a calendar year or the portion of the calendar year in which the employer is subject to this subtitle." Only employers are to

pay SUTA contributions. Specifically, § 204.003 of the Texas Unemployment Compensation Act provides that "an employer may not deduct any part of a contribution from the wages of an individual in the employer's employ."

The legislature's intent that the conduct of the defendant in this case not be tolerated is clearly evidenced by Section (b) of 207.071, which provides that "an agreement by an individual employed by an employer to pay all or a portion of a contribution or reimbursement required to be paid by the employer under this subtitle is not valid."

Unequivocally, the legislature went on to state in § 207.072 of the Act that "an employer may not require or accept a waiver of a right of an individual employed by the employer under this subtitle." Acme has created a contract that contains provisions preordained invalid and void by the Texas Legislature. It is rare in law and litigation to discover legislative commands and proscriptions so clear and emphatic.

Section 207.073 of the Act also says "an employer may not directly or indirectly, make, require or accept a deduction from wages to finance a contribution or reimbursement required to be paid by the employer under this subtitle." Under any view of the law, Acme's scheme is an indirect violation of the Act. Additionally, Acme exacerbates its already unlawful conduct by continuing to exact monies beyond the upper limit of the first $9,000 of a person's compensation per annual period. Acme extracts these dollars from the first $1.00 paid until the year's end without regard to the legislative command to stop such SUTA contributions at $9,000.

Like the Texas act, Louisiana's Employment Security Act (SUTA) imposes a duty on every employer to provide unemployment benefits for its employees through contributions to the state's unemployment security fund, and the unemployment compensation contribution is paid solely by the employer. The employer may not shift any part of the

contribution to the employees. LA. REV. STAT § 23:1531(A).

Louisiana's version of SUTA is as clear as Texas' version. Only employers are allowed to pay SUTA contributions. In fact, the Louisiana legislature went further to ensure only employers paid the contribution. To determine the amount of contributions due annually, Section 1532 of Louisiana's Employment Security Act states "each employer shall pay contributions equal to two and seven-tenths percentum of wages paid by him during each calendar year." LA. REV. STAT. § 23:1532.

Also, like Texas, Louisiana emphasizes its intentions to protect individual workers rights by forbidding waivers or unconscionable contract provisions by the employer. Specifically, Section 1691 of Louisiana's Employment Security Act states that "No agreement by any individual in the employ of any person or concern to pay all or any portion of the employer's contribution, required under this Chapter, from such employee, shall be valid." LA. REV. STAT. § 23.1691.

Acme has disregarded federal and state laws, the intent of the federal and state legislatures, and the public policy of the federal and state legislatures. This scheme negates FICA, FUTA, and SUTA statutes. Whether directly or indirectly Acme cannot recover its money from Hathcock.

CONCLUSION

For the foregoing reasons, Hathcock respectfully asks the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit and, upon review, to reverse the judgments of the Fifth Circuit and the District Court and remand the case for trial.

Respectfully submitted,

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(Any footnotes trail end of each document)
No. 00-20810

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BOBBY HATHCOCK,
Plaintiff-Appellant,

Versus

ACME TRUCK LINES, INC.,
Defendant-Appellee.

September 6, 2001, Decided

SUBSEQUENT HISTORY:
Rehearing Denied October 3, 2001, Reported at: *2001 U.S. App. LEXIS 22378.*

PRIOR HISTORY:
Appeal from the United States District Court for the Southern District of Texas, Houston Division. H-99-CV-2216. Davie Hittner, US District Judge.

DISPOSITION:
AFFIRMED.

COUNSEL:
For BOBBY HATHCOCK, Plaintiff - Appellant: Herbert Tobias Schwartz, Williams Bailey Law Firm, Houston, TX. Richard Neill Countiss, Law Office of Richard N Countiss, Houston, TX.

For ACME TRUCK LINE INC, Defendant - Appellee: M David Frock, Houston, TX. Ellis B Murov, Charles Frederick Seemann, III, Deutsch, Kerrigan & Stiles, New Orleans, LA.

JUDGES:
Before JOLLY, SMITH, and WIENER, Circuit Judges.

OPINIONBY:
WIENER

OPINION:

WIENER, Circuit Judge:

Plaintiff-Appellant Hathcock seeks reversal of the district court's grant of summary judgment in favor of Defendant-Appellee Acme Truck Lines, Inc. ("Acme"). Because we find Hathcock, in his capacity as a truck driver, was an employee of Acme at all pertinent times, we affirm the district's court grant of summary judgment.

I.

FACTS AND PROCEEDINGS

Acme transports equipment, materials, and supplies throughout the country. Hathcock, pursuant to a written agreement (the "lease agreement") leased his truck to Acme. The third paragraph of the lease agreement contains the provision central to this case:

> "As consideration for the use of the Leased Equipment...Lessee [Acme] agrees to pay Lessor [Hathcock] (70%) percent of the "Earned Revenue derived by the Lessee from the Leased Equipment [Hathcock's truck],"...less driver's wages; payroll taxes (including FICA and other deductions); cost of medical or hospitalization insurance, if applicable;...and such other costs or payments made by Lessee by reason of driver employment and less any "Operating costs and expenses,"[defined in detail, and not contested, in the fifth paragraph of the lease agreement]...which are incurred by Lessee in connection with the use and/or operation of the Leased Equipment for which Lessor shall be responsible" (emphasis added).

Acme accorded Hathcock the option of choosing and designating the driver of the truck he leased to Acme or allowing Acme to supply the driver for his truck.

Exercising his option to choose the driver of his truck, Hathcock selected himself. Pursuant to another provision of the lease agreement, he allocated ten percent (10%) of his Lessor's revenue to driver's wages. In keeping with its company policy, Acme informed Hathcock that he would be paid by two separate checks one to him as lessor for the lease of his truck ("rental check") and the other to him as the designated driver of that truck ("paycheck"). In another memorandum, Acme informed Hathcock of the fixed percentage of the driver's wages that it would deduct from the rental check to cover those driver– and employee–related costs detailed in the lease agreement's above-quoted third paragraph as chargeable to the lessor.

Eventually, Hathcock terminated the lease agreement. He then filed suit against Acme in Texas state court, asserting various causes of action including fraud, breach of contract, conversion, and unjust enrichment. Acme removed the case to the United States District Court for the Southern District of Texas. After the parties filed cross motions for summary judgment, the district court granted Acme's motion and denied Hathcock's. After his Motion for Reconsideration was denied, Hathcock timely filed a notice of appeal.

II.

DISCUSSION

A. Standard of Review

We review a grant of summary judgment de novo, applying the same standard as the district court.[1] A motion for summary judgment is properly granted only if there is no genuine issue as to any material fact.[2] An issue is material if its resolution could affect the outcome of the action.[3] In deciding whether a fact issue has been created, we must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party.[4]

The standard for summary judgment mirrors that for judgment as a matter of law.[5] Thus, the court must review all of the evidence in the record, but make no credibility determinations or weigh any evidence.[6] In reviewing all the evidence, the court must disregard all evidence favorable to the moving party that the jury is not required to believe, and should give credence to the evidence favoring the nonmoving party as well as that evidence supporting the moving party that is uncontradicted and unimpeached.[7]

B. Hathcock's Dual Capacity as Lessor and Driver

Hathcock bases his claims on the proposition that Acme and only Acme is responsible for FICA, FUTA, and SUTA taxes.[8] Therefore, contends Hathcock, Acme's deductions from his rental check to help defray its costs for those taxes were unlawful. The legality of the payment system employed by Acme depends in large part on its statutory and contractual ability to treat Hathcock as an owner-lessor for some purposes while treating him as an employee for others.

Hathcock does not contend that if he had selected and designated a third party to drive his truck for Acme, that driver would not have been lawfully and properly deemed an employee of Acme and paid directly by Acme and not by Hathcock. Neither does he contest that if such had been the case Acme would have been entitled to deduct from Hathcock's rental check all employee costs designated as such in the lease agreement. Hathcock's sole contention here is that everything changes when the individual who leases his truck to Acme drives it himself, i.e., that employee costs incurred by Acme when the lessor drives cannot be charged back against that person, wearing his lessor's hat.

In diametric opposition, Acme insists that it is entitled to treat Hathcock the same way when he drives the truck that he leased to Acme as it would treat a third-party driver chosen by Hathcock. Thus, Acme insists, it was entitled to pay him with two checks, one for each of his roles, and to deduct the contractually specified employee costs from his rental check. Acme uniformly treats all truck drivers including those who own their trucks and lease them to Acme

as employees, paying them by payroll checks from which the employees' portions of federal income, state income, and social security taxes are withheld. In contrast, Acme treats all lessor-owners including those who choose to drive their leased-out trucks as independent contractors, paying them by rental check from which are deducted the lessor-designated driver's wages plus a percentage thereof to cover the employer's share of payroll taxes and other employer-related costs incurred by Acme.

Because most of Acme's lessor-owners do not choose to drive their own trucks, Acme's two-check system is the norm, and is commercially logical as well. As suggested by a venerable case from this court and by a decision from the Texas Workers' Compensation Commission as well, Acme's application of its two-check, dual-capacity system to Hathcock is proper:[9] Acme may simultaneously treat him as an owner-lessor and as a driver-employee. Hathcock had the option either to drive the truck himself or to select a third-party driver, and the lease agreement clearly contemplates the lessor/driver dichotomy. When Hathcock elected to drive the truck himself, he donned a second hat.

C. Hathcock's Status as an Employee

Hathcock argues that he was an independent contractor at all times and was never Acme's employee. Acme, on the other hand, maintains that when Hathcock elected to serve as a truck driver, he became Acme's employee despite his continued role as the independent contractor/lessor of the truck. The district court, in granting summary judgment in Acme's favor, was satisfied that the facts, viewed in the light most favorable to Hathcock, established that he was an employee when he drove the truck leased to Acme. We agree with this determination of the district court.

Hathcock's capacity vis-a-vis Acme when he drove the truck is material. If he were Acme's employee, then he created a portion of Acme's FICA, FUTA, and SUTA tax liability, making Acme's withholdings from Hathcock's driver paycheck not merely proper but mandated by state and federal tax law. Conversely, if Hathcock were an independent

contractor when wearing his driver's hat, withholding monies from his rental check to cover Acme's employee expenses would have been improper. In fact, if Hathcock were an independent contractor when he drove, Acme would not have been responsible for withholding and remitting income, FICA, FUTA, and SUTA taxes because Acme is required to do that for its employees only.

Courts have developed various tests to differentiate employees from independent contractors. Case law from both Texas and Louisiana recognizes "the right to control an employee's conduct" as the most important component of the determination.[10] The state appellate court in Hoecsht Celanese Corp. v. Compton explained that Texas courts analyze five factors in determining the employer's degree of control: (1) the independent nature of the workman's business; (2) the workman's obligation to furnish necessary tools, supplies, and materials; (3) the workman's right to control the progress of the work except as to the final results; (4) the time for which the workman is employed; and (5) whether the workman is paid by time or by job.[11] Similarly, we have evaluated employment relationships in the context of Title VII and the ADEA by using a hybrid economic realities/common law control test that focuses on whether the alleged employer had the right to hire and fire, the right to supervise, the right to set the work schedule, paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment.[12] And, in examining employee status under an FLSA claim, we considered five factors: (1) degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.[13]

Under each of the foregoing tests, the instant facts mandate a conclusion that an employer-employee relationship existed when Hathcock drove the truck for Acme, regardless of his contemporaneous ownership of the vehicle and his independent contractor role as its lessor. Acme treated Hathcock as an employee for tax purposes and

withheld mandated federal and state income and social security taxes from his driver's paycheck, and paid Hathcock, the driver, a regular salary as an employee. When he drove, the terms and conditions of Hathcock's employment were set by Acme: He had to submit to Acme's medical and driving requirements; he was subject to discipline for violation of Acme's personnel policies, including anti-harassment, drug testing, and 401(k) Plan; he was subject to discharge by Acme for violations of its Driver Manual; he was bound to work exclusively for Acme; and while doing so he had to drive a truck sporting the Acme logo at all times. In addition, Acme covered the costs of advertising, employing administrative staff, and soliciting business, including all business for Hathcock. He had no outside or personal customer base; he was "on-call" for Acme at all times; he did not participate in setting prices or rates for his deliveries; and Acme owned all permits and transportation rights required for Acme drivers, including Hathcock. The relationship between Acme and its drivers, including Hathcock, has always been of an indefinite duration. Finally, Acme showed that the IRS conducted an employment tax compliance check in 1996, and found no fault with Acme's accounting, deductions, or treatment of drivers as employees.

Hathcock does not dispute the facts presented by Acme. Instead, he offers only his own deposition testimony expressing his subjective belief that he was an independent contractor and stating that he was treated as such by his CPA. Neither we nor the courts of Texas, however, have allowed a party's otherwise unsupported, conclusional testimony to create a factual dispute sufficient to defeat a motion for summary judgment.[14]

Hathcock's second argument purporting to create a genuine fact issue is that he possessed significant control over his work as a driver. Under the lease agreement, Hathcock, as a lessor, was allowed to set the driver's wages as a percentage of the lessor's revenue, was authorized to choose a driver and could veto Acme's choice of driver if Hathcock elected not to choose one.[15] As lessor, Hathcock also had the responsibility of maintaining the truck and providing specified services. The flaw in Hathcock's second

argument lies in his failure to recognize (or his deliberate blurring of) the distinction between Hathcock, the owner-lessor, and Hathcock, the driver. Even though, as the owner-lessor, he possessed a modicum of control, as a driver he possessed none of consequence.

Although it is virtually indistinguishable from his second argument, Hathcock's third argument for insisting on the existence of genuine issue of material fact is grounded in the jurisprudential definition of an independent contractor. Under both Texas and Louisiana case law, an independent contractor is one who "works according to his own methods without direct supervision or control by the employer except as to the overall result."[16] Proffering this standard, Hathcock notes that, as driver, he picked his own delivery routes, and Acme did not interfere with "other details" of his performance.

In assessing whether drivers for a courier service were employees or independent contractors, we stated that "initiative, not efficiency determines independence."[17] Hathcock's ability to pick his delivery route and work details does not evince sufficient initiative to allow him to be classified as an independent contractor as a matter of law.

Generally, the worker-status inquiry is fact intensive, and presumption weighs in favor of submission of such inquiries to the jury. The instant case, however, presents a situation that permits only one reasonable conclusion: Wearing his truck driver's hat, Hathcock was Acme's employee.[18]

D. Exclusivity of Tax Provisions at Issue

Undeterred, Hathcock argues alternatively that, even if Acme's lessor-drivers are deemed to be its employees, Acme nevertheless violates federal and state law when it deducts money from a lessor-driver's rental check to defray the employer's FICA, FUTA, and SUTA tax expenses. The tax liabilities created by those provisions, he contends, are the exclusive responsibility of employers.[19] The relevant provisions, however, do not forbid Acme's practice of charging those employee costs back to its lessors. Acme expressly deducts from the rental check given to its lessors a

fixed percentage of the drivers' wages to recoup its employee-related costs; it does not deduct these contributions from the paychecks given to its employees, including drivers.[20] Although the statutes delineate the functions of withholding and remitting these taxes as the responsibility of the employer vis-a-vis the taxing authority, they only bar deduction of the employer's portion of these taxes from the "wages of an individual in the employer's employ." The statutes do not prohibit employers from charging back and deducting from independent contractors, suppliers, lessors, or other non-employee personnel, funds to defray the employer's costs in connection with those taxes. As the arrangement embodied in Acme's lease agreement does not contravene federal or state laws or regulations, much less their respective public policies, Acme may, in keeping with its contracts, lawfully deduct part of its employee-related expenses from its rental payments to lessors qua lessors, even if Acme incurs those expenses by virtue of its employment of lessors qua drivers.

III.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of Acme is

AFFIRMED.

Footnotes

[1] *Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998).*

[2] Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).*

[3] *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

[4] See *Olabisiomotosho v. City of Houston, 185 F.3d 521, 525 (5th Cir. 1999).*

[5] *Celotex Corp., 477 U.S. at 323.*

[6] *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).* **[**5]**

[7] *Id. at 151.*

[8] FICA refers to Social Security or Federal Insurance Contribution Act taxes. FUTA refers to Federal Unemployment Tax Act taxes. SUTA refers to the state analogues of the FUTA taxes. In the case at bar, SUTA will refer to both the Texas and Louisiana counterparts to FUTA.

[9] See *Helms v. Sinclair Refining Co., 170 F.2d 289, 291 (5th Cir. 1948)* (There is not necessarily such repugnance between them that both relationships [that of independent contractor-employer and that of master-servant] could not exist at the same time in connection with different phases of the work. An employee might be an independent contractor as to certain work and a mere servant as to other work not embraced within the independent contract."); see also, Rakowitz v. Zurich American Ins. Co., Docket No. SA/98-107023/01-CC-SA45 (Tex. Workers' Comp. Comm'n 1999) (deciding that the deceased occupied dual roles of lessor and driver with Acme and that on the day of his accident, he was acting as a lessor and therefore could not recover benefits due to him as an employee).

[10] *Newcomb v. North East Ins. Co., 721 F.2d 1016, 1017 (5th Cir. 1983)* (discussing the Louisiana test); *Hoechst Celanese Corp. v. Compton, 899 S.W.2d 215, 220* (Tex. App. - Houston 1994).

[11] *Hoecsht, 899 S.W.2d at 220* (citing *Pitchfork Land and Cattle Co. v. King, 162 Tex. 331, 346 S.W.2d 598 (1961)).*

[12] *Deal v. State Farm County Mutual Ins. Co., 5 F.3d 117, 118-19 (5th Cir. 1993).*

[13] *Herman v. Express Sixty-Minutes Delivery Service, 161 F.3d 299, 303 (5th Cir. 1998)* (rigorously applying the five factors to the specific facts of the case and stating, "no single factor is determinative.").

[14] See, e.g., *Marshall v. East Carroll Parish Hosp., 134 F.3d 319, 324 (5th Cir. 1998)* (citing *Clark v. America's Favorite Chicken Co., 110 F.3d 295, 297 (5th Cir. 1997)* ("Unsupported allegations . . . or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment.")); *Hoecsht, 899 S.W.2d at 221* ("The key inquiry in such a situation is control, not a party's belief as to their status.").

[15] Acme allows lessors who choose their own drivers to select a percentage, between 10% and 25% of their lessors' revenue, as the drivers' wage.

[16] *Newcomb, 721 F.2d at 1017; Hoechst, 899 S.W.2d at 220* ("An independent contractor has been defined as any person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details.") (internal quotations omitted) (citations omitted).

[17] *Herman, 161 F.3d at 305* (citing *Usery v. Pilgrim Equipment Co., 527 F.2d 1308, 1314 (5th Cir. 1976)* ("Routine work which requires industry and efficiency is not indicative of independence and nonemployee status.")).

[18] Here, we assume that when driving the truck Hathcock was discharging his driver obligations, including pick-up and delivery of items pursuant to Acme's business. When Hathcock drove his own truck for the limited purpose of discharging his contractual obligation of truck maintenance and service, then he was acting in the capacity of lessor.

[19] Hathcock relies on the following federal and state tax statutes:

26 U.S.C. § 3111: "Old age, survivors, and disability insurance In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ...paid by him with respect to employment..."

26 U.S.C. § 3301: "There is hereby imposed on every employer...an excise tax, with respect to having individuals in

his employ..."

Tex. Labor Code § § 204.002, 204.003: "An employer shall pay a contribution on wages for employment paid during a calendar year..."

"An employer may not deduct any part of a contribution from the wages of an individual in the employer's employ."

La. Rev. Stat. Ann. § 23:1531: "Contributions shall accrue and become payable by each employer...with respect to wages for employment. These contributions shall become due and be paid by each employer...and shall not be deducted, in whole or in part, from the wages of individuals in the employer's employ."

[20] Pursuant to federal law, Acme withholds the employees' share of required federal and state income and social security (FICA)taxes, including deductions from drivers.

No. 00-20810

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BOBBY HATHCOCK,
Plaintiff-Appellant,

Versus

ACME TRUCK LINES, INC.,
Defendant-Appellee.

October 11, 2001 Filed

Appeal from the United States District Court for the Southern District of Texas, Houston.

Before JOLLY, SMITH, and WIENER, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: OCT 11 2001

No. 00-20810
CIVIL ACTION NO. H-99-2216

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BOBBY HATHCOCK,
Plaintiff,

Versus

ACME TRUCK LINES, INC.,
DefendantS.

July 14, 2000 Filed

ORDER

Pending before the Court is the Motion for Summary Judgment (Document #48) filed by the plaintiff Bobby Hathcock ("Hathcock"), the Motion for Summary Judgment (Document #49) filed by the defendant Acme Truck Line, and the Motion to Strike Plaintiff's Summary Judgment Evidence and Alternative Evidentiary Objections (Document #57) filed by Acme. Having considered the motions, submissions, and applicable law, the Court determines that Acme's motion for summary judgment should be granted and Hathcock' s motion for summary judgment denied. Acme's motion to strike is denied as moot.

Acme is a Louisiana corporation with truck terminals in Louisiana and Texas. Acme transports equipment, materials, and supplies throughout the United States. Acme does not own its own trucks. Rather, it leases vehicles of various sizes from other corporations, partnerships, and individuals. Acme employs drivers about half of whom own theft own trucks.

Hathcock owns a 1990 Ford pick-up truck. In July,

1996, Hathcock and Acme executed a Lease Agreement for that truck. Pursuant to the terms of the Lease Agreement, Acme paid Hathcock seventy percent of the earned revenue derived by the lessee from the leased equipment, less *inter alia* driver's wages, payroll taxes (including FICA and other deductions), and such other costs or payments made by Lessee by reason of driver employment. Pursuant to the Lease Agreement, Hathcock received a rental check whenever his truck was used to deliver supplies, materials and other goods as requested by Acme customers.

Acme contends that the twenty-three percent it charged lessors was not the actual withholding of FICA, FUTA or other taxes paid to Hathcock under the lease. Rather, the twenty three percent deducted from the lease payments to Hathcock was a percentage of the driver's wages, intended to cover part of Acme's payroll taxes with respect to those wages as provided for under the lease. Thus, the 23 percent did not represent the withholding of taxes but was an amount calculated by Acme and intended to defray part of Acme's cost for FICA, FUTA, SUTA, worker's compensation and other taxes as a result of paying wages to drivers.

Acme also employed Hathcock to drive his own truck. Pursuant to the employment agreement, Hathcock would receive a separate employment check and separate truck rental check.

Hathcock filed the instant complaint alleging that Acme engages in an illegal scheme whereby it deducts the employer's portion of FICA/Medicaid, the employees portion of FICA/Medicaid, FUTA and SUTA from the paychecks of its employees. Hathcock asserted claims of fraud, breach of contract, conversion and unjust enrichment.

Hathcock filed a motion for summary judgment arguing that he is entitled to prevail in this lawsuit as there are no genuine issues of material fact. Acme also has filed a motion for summary judgment. In its motion, Acme argues

that it is entitled to summary judgment with respect to each of the claims asserted by Hathcock.

Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Initially the movant bears the burden of demonstrating to the Court that there is an absence of a genuine issue of any material fact. Id. at 323. The burden then shifts to the party who bears the burden of proof on the claims on which summary judgment is sought, to present evidence beyond the pleadings to show there is a genuine issue for trial, Id. A genuine issue for trial exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, *249-50* (1986) (citations omitted).

The Court has reviewed Hathcock's motion for summary judgment and determines that it should be denied. Hathcock, as a plaintiff, has failed to establish that he is entitled to prevail on summary judgment. Acme, however, has established that it is entitled to prevail on summary judgment on each of Hathcock' s claims, as is more filly discussed, *infra*.

In his complaint, Hathcock alleges that he was an independent contractor when he worked for Acme. Thus, he alleges that Acme should not have withheld various taxes which are only applicable for employees. In response, Acme has exhaustively briefed the issue of why Hathcock is an employee and not an independent contractor. However, in his motion for summary judgment, Hathcock argues that the issue of whether or not he is an employee is irrelevant to this case.

> Whether the plaintiff and class members are independent contractors or whether they are employees of the Defendant is immaterial. If

> the plaintiff and these class members are employees, the owners/operators have no liability for FUTA taxes and hence the deductions are patently and purposefully unlawful. If the Plaintiff and class are independent contractors, they may not be assessed FUTA taxes because they are, by statute, the sole obligation and responsibility of an employer for the benefit of an employee and an independent contractor is not an employee.

Plaintiffs Motion for Summary Judgment at 18.

Notwithstanding Hathcock's equivocation on this point, the Court determines that the summary judgment evidence submitted establishes that Hathcock was an employee and not an independent contractor during the time he worked for Acme.

Acme seeks summary judgment with respect to Hathcock' s allegations of fraud. To establish a cause of action for fraud a plaintiff must prove an intentional misrepresentation or omission regarding a material fact upon which one reasonably and detrimentally relies. Abbott v. Equity Group, Inc., 2 F.3d 613, 624 *(5th* Cir. 1993), cert. denied, 114 S.Ct. 1219 (1994). According to Acme, it should prevail on summary judgment with respect to the fraud claim because: (1) Hathcock knew, pursuant to the rental agreement that he signed that he would receive two separate checks, one for driving his truck and one for leasing his vehicle to Acme; and (2) Hathcock knew that Acme would withhold twenty three percent of driver wages from his rental check, pursuant to the lease agreement. Thus, Acme argues that Hathcock cannot maintain a fraud cause of action as no misrepresentations were made.

The Court agrees with Acme's argument with respect to the fraud claim. Hathcock signed a lease agreement which specifically sets forth the amount of money that Acme would

withhold from the rental paymnents. Hathcock has offered no summary judgment evidence to the contrary. Accordingly, summary judgment is granted with respect to the fraud/misrepresentation claim.

The thrust of Hathcock's breach of contract claim is that Acme was in a special business relationship with him that gave rise to an implied covenant of good faith and fair dealing. Acme breached this implied covenant by deducting money for taxes for which Hathcock did not owe, by not informing Hathcock that he owned no taxes, and by charging Hathcock an excessive administrative fee to accomplish these unlawful takings.

Acme argues that it did not breach any contract with Hathcock or breach any terms of its employment agreement with Hathcock. Hathcock, in response, has failed to adduce summary judgment evidence to support his breach of contract claim, other than to rely upon his general contention that Acme wrongfully deducted FICA, SUTA, FUTA, worker's compensation and other taxes from its employees' paychecks. The Court determines that there is no summary judgment evidence to support a claim for breach of contract and summary judgment is proper with respect to this claim.

Hathcock has alleged that Acme converted funds from the paychecks of its employees for its own use, while representing that the funds were being used to pay for plaintiff's tax liability under SUTA, FUTA, FICA, worker's compensation and other taxes when in fact, plaintiff has no obligation to pay such taxes. Pursuant to Texas and Louisiana law, a party commits conversion if it exercises wrongful dominion and control over personal property belonging to another. Mitchell Energy Corp. v. Samson Resources Co., 80 F.3d 976, 984 *(5th* Cir. 1996); Dual Drilling Co. v. Mills Equip. Inv., Inc., 712 So.2d 853, 857 (La. 1998).

Acme argues that summary judgment is proper with respect to the conversion claim because where a party consents to the complained of conduct, a party cannot be held liable for conversion under either Texas or Louisiana

law. Gronberg v. York, *568* S.W.2d 139, 145 (Tex. App–Tyler 1978); Seal v. Knorpp, *957* F.2d 1230, 1238 *(5th* Cir. 1992). In Gronberg, the court rejected the plaintiffs conversion claim in a similar factual setting, stating that:

> Where a person has knowledge that funds are being deducted from his weekly earnings . . . and he does not object or forbid the same to be done, he certainly acquiesces in such taking and cannot base an action of conversion on such circumstances. . .

Prior to entering into the lease agreement with Acme, Hathcock knew that Acme would be deducting twenty-three percent from his rental check. Thus, even assuming the facts in the light most favorable to Hathcock, he has presented no summary judgment evidence that he was unaware that funds were being withdrawn from his rental payments (even assuming arguendo that the withdrawal of such funds was unlawful). Accordingly, summary judgment will be granted on the conversion claim.

Hathcock also has alleged a cause of action for unjust enrichment. According to the complaint, Acme took deductions of the various taxes from the plaintiff on the pretext that the funds taken were taken lawfully and were the employee's burden to pay. Through this practice, Hathcock argues that Acme was unjusfly enriched.

In its motion for summary judgment, Acme argues that neither Texas nor Louisiana law recognizes unjust enrichment claims where the parties have a contractual relationship. Marple v. Kurzweg, 902 F.2d 397, 401 *(5th* Cir. 1990); Green v. Levis Motors. Inc., 994 F. Supp. 735, 741-42 (M.D. La. 1997). Thus, because the lease agreement in this case constitutes a contract, extra-contractual remedies, such as unjust enrichment, are not available to Hathcock. The Court agrees and determines that as a matter of law, Hathcock is precluded from asserting a cause of action for unjust enrichment in this case.

Hathcock's final cause of action is money had and received. Specifically, Hathcock alleges that Acme wrongfully took money from Hathcock' s compensation, purportedly pursuant to the requirements of SUTA, FUTA, FICA, worker's compensation, and various other taxes, when in fact no such taxes were owed. Thus, Hathcock argues that these monies belong to him and must be returned to him.

Acme argues that this claim should be dismissed because Acme's two-check system is legal and valid.[1] Acme contends that it did not deduct or withhold SUTA, FUTA, FICA, worker's compensation premiums, or any other taxes from the paychecks of those driving the leased trucks. Rather, Acme has passed along some of the costs to the lessor of the trucks. According to Acme, this does not constitute a violation of the statutes upon which Hathcock relies, as those sums have not been deducted from the paychecks of the drivers. Thus, Acme did not violate the laws prohibiting it from passing along these costs to the its employees.

The Court agrees with Acme's analysis. The twenty-three percent deducted from the rental payments did not represent withholdings of the various taxes but rather was an amount estimated by Acme to defray Acme's cost for the taxes as a result of its having to pay wages to the drivers. The summary judgment evidence presented to the Court convincingly establishes that this practice did not violate the federal laws or the laws of Texas or Louisiana. Accordingly, summary judgment is proper.

Based upon the foregoing, the Court hereby

ORDERS the following:

(1) the Plaintiff's Motion for Summary Judgment (Document #48) is DENIED;

(2) the Defendant's Motion for Summary Judgment (Document #49) is GRANTED; and

(3) the Motion to Strike Plaintiff's Summary Judgment Evidence and Alternative Evidentiary Objections

(Document #57) is DENIED AS MOOT.

All parties shall bear their own costs.

SIGNED at Houston, Texas on this the 14 day of July, 2000.

DAVID HITTNER
United States District Judge

Footnote

[1] In Fact, Acme argues that Hathcock actually earned more money under the twocheck system than he would have earned if had received only one global paycheck.

CIVIL ACTION NO. H-99-2216

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BOBBY HATHCOCK,
Plaintiff,

Versus

ACME TRUCK LINES, INC.,
DefendantS.

July 14, 2000 Filed

FINAL JUDGMENT

As the Court has entered an Order granting summary judgment in favor of the defendant and against the plaintiff the Court hereby

ORDERS that judgment be entered in favor of the defendant

THIS IS A FINAL JUDGMENT.

All parties shall bear their own costs.

SIGNED at Houston, Texas on this the 14 day of July, 2000.

DAVID HITTNER
United States District Judge

CIVIL ACTION NO. H-99-2216

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BOBBY HATHCOCK,
Plaintiff,

Versus

ACME TRUCK LINES, INC.,
DefendantS.

August 29, 2000 Filed

ORDER

Pending before the Court is the Motion for Reconsideration and Motion for Rehearing of Summary Judgment (Document #64) filed by the plaintiff Having considered the motion, submissions, and applicable law, the Court determines that the motion should be denied. Accordingly, the Court hereby

ORDERS that the Motion for Reconsideration and Motion for Rehearing of Summary Judgment (Document #64) is DENIED.

SIGNED at Houston, Texas on this the 28 day of August, 2000.

DAVID HITTNER
United States District Judge

No. 00-20810

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOBBY HATHCOCK,
Plaintiff - Appellant

v.

ACME TRUCK LINE INC.,
Defendant - Appellee.

October 3, 2001, Filed

PRIOR HISTORY:

Appeal from the United States District Court for Southern District of Texas, Houston.

Original Opinion of September 6, 2001, Reported at: *Hathcock v. Acme Truck Lines, Inc., 262 F.3d 522, 2001 U.S. App. LEXIS 19693.*

JUDGES:

Before JOLLY, SMITH, and WIENER, Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

Jacques L. Wiener, Jr.
United States Circuit Judge

LEASE AGREEMENT

STATE OF TEXAS
COUNTY/PARISH OF HARRIS
DATE: JULY 18, 1996

THIS LEASE AGREEMENT made and entered into on this 18 day of July 1996, by and between Robert Hathcock, Jr., (Owner) of 5650 Timber Creek Place Dr. #509 (Resident Address) Houston (City) Texas 77084(County/Parish and State) (hereinafter called the "Lessor"), and Acme Truck Line, Inc. of Post Office Box 183, Harvey, Jefferson Parish, Louisiana 50059 (hereinafter called the "Lessee").

FOR AND IN CONSIDERATION of the mutual covenants, agreements and stipulations as hereinafter provided, the parties hereto agree as follows:

1.Robert H. Hathcock, Jr., Lessor, represents and does by these presents, lease and let unto Acme Truck Line, Inc., Lessee, for a term of five (5) years, beginning on the 18 day of July, 1996 and ending on the 17 day of July, 2001, as herein provided the following commercial motor vehicle equipment (hereinafter called "Leased Equipment"):

	Year	Make and Type	Truck #	Vehicle I.D. #	License #
a	1990	Ford F250		1FTHF25M1LNA45402	MF4111
b					
c					
d					

2. Lessor warrants and represents that he is the owner or agent and attorney-in-fact for the owner of the Leased Equipment and that said Leased Equipment, including all accessories and parts, is in good operating and mechanical condition in every respect, capable and suitable for the transportation of Lessee's commodities, in full compliance

with the U.S. Department of Transportation, Federal Highway Administration rules and regulations for safety, and that said Leased Equipment meets all rules and regulations of the Interstate Commerce Commission and all other regulatory authorities, as well as all statutes, ordinances or other laws of all local, state and federal governmental authorities having jurisdiction, and that said Leased Equipment is not subject to any other lease, memorandum or agreement.

3. As consideration for the use of the Leased Equipment, as herein provided, Lessee agrees to pay Lessor seventy (70%) percent of the "Earned Revenue derived by the Lessee from the Leased Equipment", as defined herein, less driver's wages; payroll taxes (including FICA and other deductions); cost of medical or hospitalization insurance, if applicable; pre-employment driver application information costs, including cost of obtaining motor vehicle driving record; cost of pre-employment driver medical examinations, testing and screening; cost of driver medical examinations, testing and screening, including driver drug testing, screening, medical evaluations and consultations, and biannual medical examinations as may be required by the U.S. Department of Transportation, Federal Highway Administration or any other governmental body, and such other costs or payments made by Lessee by reason of driver employment, and less any "Operating and costs and expenses", and other charges, hereinafter provided, which are incurred by Lessee in connection with the use and/or operation of the Leased Equipment and for which Lessor shall be responsible.

4. "Earned Revenue derived by the Lessee from the Leased Equipment" shall include the following charges in connection with the operation and/or use of the Leased Equipment from which Lessee has derived earned revenues pursuant to the applicable tariffs or contracts, to-wit: line haul charges, hourly work and detention time charges, diversion or reconsignment charges and pipe stringing and pick-up charges. Other earned revenues involving non-Leased Equipment and extra labor charges shall not be included in the "Earned Revenue derived by the Lessee from the Leased Equipment". On earned revenues involving contract rates, there shall be deducted an amount equal to the current

interstate tariff insurance surcharge percentage which deduction shall not be considered "Earned Revenue derived by Lessee from the Leased Equipment".

5. "Operating costs and expenses" which are incurred by Lessee in connection with the operation and/or use of the Leased Equipment and for which Lessor shall be responsible shall, without limitation, include the following, to-wit: advances made by Lessee (wired money, purchase orders, fuel card purchases and cash advances): wrecker service charges; vehicle inspection charges; loading and unloading charges; interchange fees; license plate fees; cab cards; fuel taxes; road taxes; sales taxes; equipment use and ad valorem taxes and fees; state and federal registration fees, taxes, tags or stamps; empty mileage; permits of all types; tolls; ferries; detention and accessorial services; base plates and licenses; driver fines and penalties for violations of traffic or highway regulations or laws as imposed by any governmental body; and, any other fees, charges, penalties, fines, tolls, or other taxes which may be assesses of levied against the Leased Equipment or its driver or against Lessee resulting from the operation an/or use of the Leased Equipment. Notwithstanding the above, except when a violation results from any acts or omissions of the Lessor, Lessee shall assume the risks and costs of fines for overweight and oversize trailers when the trailers are pre-loaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside of Lessor's control, and for improperly permitted overdimension and overweight loads, and Lessee will reimburse Lessor for any fines paid by Lessor in this connection. In addition, Lessor shall be solely responsible for all maintenance and repairs to the Leased Equipment, including, without limitation, cost of fuel, gasoline, oil, tires, tubes, tarpaulins, chains, binders, accessorial equipment, parts and repairs, and all cost, advances, and/or expenses incurred by Lessee in this regard shall be deducted from this amounts due Lessor. In this connection, Lessor agrees to maintain the Leased Equipment and its accessories in good working order and condition during the term of this lease, and Lessor agrees to hold Lessee harmless and to indemnify Lessee against any and all loss damages. Cost or expenses

which the Lessor may hereafter incur, suffer or be required to pay by reason of the failure of the Lessor to properly maintain and repair the Leased Equipment and its accessories. The Lessor shall be afforded copies of those documents which are necessary to determine the validity of any of the above described charges.

6. It is understood and agreed that Lessor shall be responsible to Lessee for payment of an Administrative Service Charge in the amount of TWENTY AND NO/100 ($20.00) in addition to all costs incurred by Lessee in connection therewith for issuance of wired money, fuel card purchases, purchase orders, registration items and cash advances made by Lessee in connection with the operation and/or use of the Leased Equipment. In addition, Lessor shall be responsible to Lessee for payment of a fixed Administrative Service Charge of ONE THOUSAND AND NO/100 ($1000.00) for any accident involving a cargo claim and ONE THOUSAND AND NO/100 ($1000.00) DOLLARS for any accident involving a liability claim involving bodily injury and/or property damages. Lessor shall be responsible for an additional Administrative Service Charge of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS for any cargo claim involving rain and/or water damage to any cargo. These Administrative Service Charges shall be deducted from Lessor's weekly settlements in an amount not to exceed ONE HUNDRED AND NO/100 ($100.00) DOLLARS a week. The Administrative Service Charges provided herein shall be non-refundable and will be used to defray administrative expenses incurred by Lessee. Lessor will be provided with a written explanation and itemization of all of the above described charges.

7. Payment to the Lessor pursuant to this Lease shall be made within fifteen (15) days after submission by Lessor to Lessee of the necessary "delivery documents" and other "paperwork" concerning a trip in the service of the Lessee. Necessary "delivery documents " shall include bills of lading/waybills properly signed by shipped/customer (complete), customer purchase orders, weight tickets and delivery receipts, and other "paperwork" of the rated freight bill (invoice) shall be surrendered by Lessee prior to or at the

time of settlement and the Lessor shall be granted the right to examine copies of the applicable tariff.

8. It is understood and agreed that Lessee shall have continuous and exclusive possession, control and use of the Leased Equipment for the duration of this Lease. Lessee assumes complete responsibility for the operation of the leased equipment for the duration of this lease. During the term hereof, the Leased Equipment shall not be operated for any purpose other than the transportation for Lessee and on Lessee's behalf of machinery, equipment and materials as authorized by Interstate Commerce Commission Certificate # 120675, Louisiana Public Service Commission Certificate # 5266-C, Texas Railroad Commission Certificate # 5206, Alabama Public Service Commission Certificate # 3269, Mississippi Public Service Certificate # 3040-T and Georgia Public Service Commission Certificate #2605, and any other authority which hereafter may be granted to Lessee herein. Further, Lessor is specifically prohibited from entering into any trip-lease, interchange or other agreement or contract involving the Lease Equipment or otherwise with any other carrier or entity, nor shall Lessor permit the unauthorized use of the Leased Equipment at any time whatsoever. In connection with these prohibitions, Lessor agrees to hold Lessee harmless and to indemnify Lessee against any and all liability, loss, damages, costs and expenses which Lessee may hereafter incur, suffer or be required to pay by reason of such lease violations.

9. It is understood and agreed that Lessee shall make all management decisions regarding the use and/or operation of the Leased Equipment, including, but without limitation, decisions concerning when and where the Leased Equipment is to operate and the type of functions it is to perform within the scope of Lessee's authority; Lessor hereby acknowledges that Lessee has made no representations, guarantees or warranties regarding minimum revenues which may be derived from the operation and/or use of the Leased Equipment and/or which will accrue to the Lessor during the term of this Lease, and Lessor acknowledges that Lessee has made no representations or guarantees as to the amount of work or number of loads which will be handled by said

Leased Equipment, and it is hereby agreed by the parties hereto that any solicitation for work regarding the Leased Equipment shall be within the sole and exclusive discretion of the Lessee.

10. Lessor agrees to be familiar with the Federal Motor Carrier Safety Regulations as prescribed by the U.S. Department of Transportation, Federal Highway Administration and to comply with all applicable rules and regulations thereof as well as all applicable policies and rules of Lessee.

11. Lessee agrees to provide insurance coverage on the Leased Equipment for the protection of the public with minimum limits of liability as required by Interstate Commerce Commission regulations under 49 U.S.C. 10927, insuring Lessee for public liability for bodily injury, property damage liability and cargo damage liability during the term of this Lease. Lessor understands and agrees that it may not be named as an insured on the above specifies policy of insurance provided by Lessee herein, and Lessor agrees to provide adequate liability insurance for its protection, including bobtail insurance which is not provided by Lessee herein. It is understood that Lessor will not initiate nor participate in any third-party claims against Lessee relation to any loss or damage involving bodily injury liability, property damage liability or cargo damage liability and Lessor agrees to hold Lessee harmless and to indemnify Lessee in connection therewith. Lessor agrees to provide and maintain adequate insurance on the Leased Equipment covering physical damage to the Leased Equipment and its accessories, including comprehensive and collision coverage and Lessor shall be responsible for all claims related thereto, and agrees to hold Lessor harmless in connection herewith. Further, Lessor agrees to immediately report to Lessee any accident, claims, losses, or damages of any kind relation to the Leased Equipment or any cargo carried theron, and agrees to provide Lessee with all written reports, affidavits, or other assistance as may be necessary to adjudicate or settle of such claim. A penalty of ONE HUNDRED AND NO/100 ($100.00) DOLLARS will be charged to Lessor's settlement for failure to report any accident within twenty-

four (24) hours of that accident.

12. It is understood and agreed between the parties hereto that Lessor shall hold Lessee harmless and indemnify Lessee against any and all liability, loss, damages, costs or expenses which Lessee may hereafter incur, suffer or require to pay by reason of any breech of any obligation or responsibility on the part of Lessor as contained in this Lease Agreement.

13. It is understood and agreed that Lessor shall furnish Lessee with any and all information or documents required by any governmental agency or authority; further, Lessor shall be responsible to Lessee and ultimately to all regulatory commissions or authorities for all required records and schedules, including, but without limitation, driver's logs, mileage reports, fuel receipts and other relevant documents. In this connection, Lessor agrees to fully cooperate with Lessee and assist Lessee in requiring drivers of the Leased Equipment to submit to required medical examinations, testing, and screening as may be required for driver qualification and certification or in order to meet such requirements as are imposed by the U.S. Department of Transportation, Federal Highway Administration or any other governmental body. In addition and without limitation, Lessor shall specifically cooperate and assist Lessee in requiring drivers to maintain and submit daily logs, fuel receipts, mileage reports, accident reports, vehicle inspection reports and any other reports required by federal, state, county/parish, or municipal body, If through the negligence or fault of Lessor, Lessee is penalized or fined as a result hereof, then Lessee reserves the right to collect the amount of all such penalties or fines from Lessor.

14. Lessor understands and agrees, under penalty of immediate cancellation of said Lease, that at no time shall non-authorized individuals drive, rid in or accompany the Leased Equipment; only authorized employees listed on Lessee's payroll and acting in the course and scope of their employment shall be permitted to drive, ride in or accompany said Leased Equipment.

15. It is understood and agreed between the parties that the Lessor is not required to purchase or rent any products, equipment or services from Lessee as a condition of entering

into this Lease Agreement. Other that the lease provisions contained herein, no other equipment purchase or rental is provided herein.

16. It is understood and agreed between the parties hereto that this Lease may be immediately cancelled at the option of either Lessor or Lessee upon advance written notice to the other party; however, this Lease shall not be cancelled by either party within the initial thirty (30) days of its term hereof, except for cause.

17. It is understood and agreed that upon termination or cancellation of this Lease, Lessor shall immediately surrender to Lessee all cab cards, stamps, fuel decals, lease acknowledgements and all other regulatory documents in Lessor's possession issued by Lessee; further, all company identification of Lessee shall be immediately removed by Lessor from the Leased Equipment and returned to Lessee. Lessor shall immediately surrender all for-hire apportioned license plates issued for the Leased Equipment to the Lessee or appropriate state governmental agency or department, and any monies received by Lessee in this connection shall be refunded to Lessor. In addition, there is an Administrative service charge of FIFTY AND NO/100 ($100.00) DOLLARS to effectively cancel this Equipment and Lease Agreement with all regulatory commissions and agencies as prescribed by law.

18. At the option of Lessee, an escrow fund will be established upon execution of this Lease in the amount of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS to be funded by Lessor and administered and maintained by Lessee for the purpose of covering those herein-provided obligations incurred by Lessor, including, but without limitation "Operating costs and expenses", driver's expenses, maintenance expenses, service charges, penalties, and in addition, shall include the amount of all charge back items and overpayments. Lessee agrees to provide individual settlement sheets indication the amount and description of any deduction or additions made to the escrow fund. However, Lessor shall have the right to demand an accounting for transactions involving the escrow fund at any time. While the escrow fund is under the control of Lessee,

the Lessee shall pay interest on the escrow fund on at least a quarterly basis. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issued yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury. At the time of the return of the escrow funs Lessor, Lessee will deduct monies for those obligations incurred by Lessor as provided in this Lease Agreement and a final accounting will be provided to Lessor of all such final deductions made to the escrow fund in accordance herewith. The balance in said escrow fund will be given to Lessor by Lessee within forty-five (45) days from the date of cancellation or termination of said Lease. In the event those obligations assumed herein by Lessor, including, but without limitation, "Operating costs and expenses", driver's expenses, maintenance expenses, services charges, penalties, chargeback items and overpayments exceed revenues due Lessor, then upon presentation of a final accounting statement by Lessee, Lessor shall immediately pay Lessee the balance due on said account.

19. This instrument constitutes the entire agreement between the parties hereto, and it shall not be amended, altered or changed except by a written agreement signed by the parties hereto.

20. The parties hereto acknowledge receipt of an original copy of this Lease Agreement.

THIS LEASE, executed in quadruplicate, on the day, month and year hereinabove first written, and in the presence of the undersigned competent witnesses, who hereunto sign their names with the said appearers, afterdue reading of the whole.

WITNESSES:

LESSOR

BY:

LESSEE- ACME
TRUCK LINE, INC.

BY:

Supreme Court, U.S.
FILED
FEB 7 2002
CLERK

NO. 01-0976

SUPREME COURT OF THE UNITED STATES

BOBBY HATHCOCK,
Petitioner

versus

ACME TRUCK LINE, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ACME'S BRIEF IN OPPOSITION TO HATHCOCK'S PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES xiv

BACKGROUND 2

ARGUMENT 3

I. HATHCOCK'S PETITION DOES NOT JUSTIFY THE EXERCISE OF JURISDICTION HEREIN 3

II. THE RELEVANT UNDISPUTED MATERIAL FACTS 5

III. JUDGES HITTNER, JOLLY, SMITH AND WIENER CORRECTLY HELD THAT THE AGREEMENT DID NOT CONTAIN *CONTRA BONOS MORES* PROVISIONS 11

A. Introduction 11

B. The Statutes on Which Hathcock Relies Address Or Relate to Wages and Not Rental Revenues 12

C. Acme Did Not and Has Not Deducted Sums Representing SUTA or FUTA Contributions, Workers Compensation Premiums and/or FICA from the Wages of Hathcock or Any Other Driver 14

1. Wages include monies for driving a truck. 14

2. Wages do not include consideration paid pursuant to a vehicle lease 15

3. Hathcock's inability to distinguish his dual capacity is, to the extent that it is not already clear, discernible by Acme's consistent treatment of all lessors 16

4. Summary: A refutation of specific statements in the Petition 19

D. Hathcock's Contention that Acme Has Illegally Shifted Its Tax Burden Is Radical, Very, Very Wrong, and Legally Unsupported 21

E. The Infirmity of Hathcock's Legal Position Is Exemplified by the Absence of Legal Support Therefor and a Meritless Parade of Horribles 24

1. The absence of legal support 24

2. Hathcock's parade of horribles 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Backaus v. Murphy Motor Freight Lines,
442 N.W.2d 326 (Minn. 1989) 12

Brown v. Vernon Sawyer, Inc., 645 So.2d 260
(La.App. 2d Cir. 1994) 15

Deleu v. Scaife, 775 F.Supp. 712
(S.D. N.Y. 1991) 12

Delno v. Celebreeze, 347 F.2d 159 (9th Cir. 1965) 16

Digiovanni v. City of Rochester, 680 F.Supp. 80
(W.D. N.Y. 1988) 12

Fontenot v. Trans Gulf, Inc., 664 So.2d 1238
(La.App. 1st Cir. 1995) 14

Ford v. Troyer, 25 F.Supp.2d 723 (E.D. La. 1998) 12

Gardner v. Ewing, 88 F.Supp. 315
(S.D. Ohio 1950), *aff'd*, 185 F.2d 781
(6th Cir. 1950), *aff'd*, 341 U.S. 321 (1951) 25

Hospital Resource Personnel, Inc. v. U.S.,
68 F.3d 421 (11th Cir. 1995) 25, 26

In re Richardson Dinner Theater, Inc.,
421 F.Supp. 423 (N.D. Tex. 1976) 27, 28

McElwee v. Wharton, 19 F.Supp.2d 766
(W.D. Mich. 1998) 12

Phillips v. Phillips, 820 S.W.2d 785 (Tex. 1991) 26

Rakowitz v. Zurich American Ins. Co.,
Docket No. SA/98-107023-/01-CC-5A45 18

Reef v. Mills Novelty Co., 89 S.W.2d 210
(Tex. App. 1936) 26

Salazar v. Brown, 940 F.Supp. 160
(W.D. Mich. 1996) 12

Sanchez v. Overmeyer, 845 F.Supp. 1178
(S.D. Ohio 1993) 12

Spilky v. Helphand, 1993 WL 159944
(S.D. N.Y. 1993) 12

Tenneco v. Padre Drilling Co., 453 S.W.2d 814
(Tex. 1970) 14

United States v. Pomponio, 528 F.2d 247
(4th Cir. 1975), *rev'd and remanded*,
429 U.S. 10 (1976) 26

STATUTES

26 U.S.C. §§3111(a) and (b) 15

42 U.S.C. §407 15

La. R.S. 23:1472(19)(b) 12

La. R.S. 23:1531 16

La. R.S. 23:532 12

Tex. Labor Code Ann. §201.181 14

Tex. Labor Code §204.002(a) 12

Tex. Labor Code §204.003 25

Tex. Labor Code §207.073 ..... 25, 26

Tex. Labor Code §§207.071-72 ..... 27, 28

MISCELLANEOUS

Supreme Court Rule 10 12

SUPREME COURT OF THE UNITED STATES

BOBBY HATHCOCK,

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versus

ACME TRUCK LINE, INC.,

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ACME'S BRIEF IN OPPOSITION TO HATHCOCK'S PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
COURT OF THE UNITED STATES

Bobby Hathcock ("Hathcock") was a driver/employee of Acme Truck Line, Inc. ("Acme") and a lessor of capital equipment. Hathcock, as an employee, received a wage. Acme undisputedly withheld and paid the appropriate taxes on those wages. Acme, as lessee, also paid rent to Hathcock in his capacity as a lessor.

Hathcock sued challenging provisions in his Lease Agreement ("Lease," "Lease Agreement," or "Agreement") that resulted in the reduction of the total amount of rent. Hathcock contends that the Agreement is *contra bonos mores*.

The trial court and the court of appeals dismissed Petitioner's lawsuit because his entire case is predicated upon

the erroneous presupposition that all of the monies paid by Acme to him were wages for personal services and that none of the monies represented consideration for lease of capital equipment. Petitioner's writ is absolutely meritless and was properly rejected by the district court and the court of appeals.

BACKGROUND

Hathcock has owned a 1990 Ford pickup truck since 1995. He leased the truck to Acme pursuant to the Lease. Acme paid Hathcock rent for the truck in accordance with the Agreement.

Hathcock drove the truck for Acme. Acme treated him as an employee, and for good reason. He was. Accordingly, Acme compensated Hathcock with a paycheck.

After Hathcock resigned, he filed suit in state court. There, Hathcock alleged on behalf of himself and others that he was an independent contractor rather than an employee, that Acme breached the Lease, that Acme defrauded him, that Acme was unjustly enriched, and that Acme had committed conversion. He further contended that the Lease was *contra bonos mores*. Finally, Hathcock sought declaratory and injunctive relief.

Acme removed the case to the United States District Court for the Southern District of Texas.

Acme sought summary judgment based on 94 statements of material fact. Hathcock did not dispute any of the 94 statements of material fact. Nevertheless, he filed a

cross-motion for summary judgment. Judge David Hittner granted Acme's Motion and denied Hathcock's Motion, as well as Hathcock's Motion for Reconsideration.

Hathcock appealed. A panel composed of the Hon. Grady Jolly, Jerry L. Smith and Jacques L. Wiener, Jr. affirmed summary dismissal. Hathcock sought reconsideration. Judges Jolly, Smith and Wiener denied the Motion for Reconsideration. Hathcock then filed a Petition for Writ of Certiorari ("Petition").

Judges Hittner, Jolly, Smith and Wiener correctly concluded that Hathcock's allegations were so lacking in merit that summary dismissal was warranted. For that reason and others, Hathcock's Petition should be denied.

ARGUMENT

I. HATHCOCK'S PETITION DOES NOT JUSTIFY THE EXERCISE OF JURISDICTION HEREIN

Hathcock does not ask this Court to review the summary determination of his status as an employee. Nor does Hathcock appear to ask this Court to review the summary dismissal of his state law breach of contract, conversion, fraud and unjust enrichment claims. Rather, Hathcock seems to ask this Court to only review whether the Agreement contravenes public policy.

Supreme Court Rule 10 requires a petition to show the existence of a compelling reason to grant a petition. Rule 10

itself describes the type of cases that potentially warrant Supreme Court review.

According to Rule 10, review could be appropriate where an appellate decision conflicts with an opinion of another court of appeal, a state court of last resort, or a decision of this Court. Hathcock's Petition, however, does not claim that the Fifth Circuit's opinion below conflicts with the opinion of another federal court of appeal, a court of last resort of any state in this country or with any decision of this Court.

Review could also be appropriate, according to Rule 10, where an important question of federal law has not been resolved by this Court. Hathcock seems to contend that the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been but should be decided by this Court. Petitioner is wrong for three reasons.

First, Hathcock filed his Petition in state court. He asserted only state law causes of actions. Second, a cursory review of Hathcock's Petition herein shows that most of the statutes which purportedly support his *contra bonos mores* claim are state rather than federal statutes. *See* pp. 3, 4, 5, 11, and 14-16 of the Petition.

Third, Hathcock does not even remotely demonstrate that the decisions and reasoning of Judges Hittner, Jolly, Smith and Wiener are erroneous. Accordingly, there is no reason why this Court should grant the Petition.

II. THE RELEVANT UNDISPUTED MATERIAL FACTS.

The following Statements of Material Fact[1] appear to be relevant to the issues raised by Hathcock in his Petition for Writ of Certiorari:

1.

Acme transports equipment, materials and supplies throughout the United States.

4.

Acme does not own trucks; rather, it leases vehicles of various sizes from corporations, partnerships, companies and individuals.

5.

Acme employs drivers about half of whom drive their own trucks. Stated differently, about half of Acme's drivers operate trucks owned by another natural or artificial person. For example, Lee Trucking Corporation owns and leases eight trucks to Acme. However, its President, Ronnie Lee, does not drive any of them. Similarly, James Rakowitz (now deceased) owned and leased five trucks to Acme. He drove one of them.

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[1] These were presented with attached deposition testimony exhibits and affidavits to Judge Hittner and with record references to same in the Fifth Circuit. References to same are deleted herein.

6.

Hathcock acquired a 1990 Ford pickup truck with over 85,700 miles on it in April 1995 for $7,050.

11.

On July 18, 1996, Hathcock and Acme executed a Lease Agreement for a 1990 pickup truck.

12.

Pursuant to ¶3 of the Lease Agreement, Acme paid lessors, including Hathcock:

> . . . seventy (70%) percent of the "Earned Revenue derived by the Lessee from the Leased Equipment," as defined herein, **less driver's wages; payroll taxes (including FICA and other deductions)**; cost of medical or hospitalization insurance, if applicable; pre-employment driver application information costs, including cost of obtaining motor vehicle driving record; cost of pre-employment driver medical examinations, testing and screening; cost of driver medical examinations, testing and screening, including driver drug testing, screening, medical evaluations and consultations, and biennial medical examinations as may be required by the U.S. Department of Transportation, Federal Highway Administration or any other

governmental body, **and such other costs or payments made by Lessee by reason of driver employment**, and less any "Operating costs and expenses," and other charges, hereinafter provided, which are incurred by Lessee in connection with the use and/or operation of the Leased Equipment and for which Lessor shall be responsible. (Emphasis added).

13.

Acme executed identical leases with its other natural and artificial lessors.

14.

During the existence of the Lease Agreement, Acme issued Hathcock a weekly settlement check ("rental check") pursuant to and in accordance with paragraph 3 of the Lease Agreement.

15.

Hathcock cancelled his Lease Agreement with Acme on February 6, 1997.

22.

Acme has discharged drivers, while at the same time maintaining (not canceling) the Lease Agreement (lessor/lessee relationship) with said drivers.

56.

Hathcock and other drivers received weekly paychecks ("employee paycheck") from Acme. Acme withheld income, social security and Medicare taxes.

62.

The IRS has conducted an employment tax compliance check on July 18, 1996. At the time, the IRS reviewed and reconciled Forms 940, 941, W-2, W-3, W-4, 1096 and 1099, together with the related compensation and leasing agreements. The compliance check specifically examined the status (employee/independent contractors) of the driver.

63.

The IRS did not find fault with Acme's:

a. Treatment of drivers as employees.

b. Deductions.

c. Accounting.

65.

Acme has submitted its Lease Agreement to federal and state agencies, including the Interstate Commerce Commission ("ICC").

66.

The ICC suggested changes to Acme's Lease Agreement in the late 1980s. The ICC, however, did not suggest, much less require, a change to ¶3 of the Lease Agreement.

67.

Neither the Texas Railroad Commission nor the Public Service Commissions in Oklahoma, Mississippi, Louisiana and Alabama have ever suggested, much less required, a change to ¶3 of the Lease Agreement.

77.

Lessors, such as Hathcock, set drivers wages with parameters (10%-25%) supplied by Acme.

78.

Hathcock chose to pay himself 10% for his driving services.

79.

Hathcock fully understood the operator/interaction of the two-check system as he chose to set the driver wage as low as possible, *i.e.*, at 10%.

80.

Acme paid rental to Hathcock in accordance with paragraph 3 of the Lease Agreement.

81.

Hathcock alleges that his economic damages consist of or are equal to the 23% of driver wages deducted from his rental check pursuant to ¶3 of the Lease Agreement.

82.

Acme and its lessors, including Hathcock, agreed that lessors would share in the costs of driver employment (up to 23% of driver wages) for such things as FUTA, SUTA, FICA, Workers Compensation insurance and more, pursuant to ¶3 of the Lease Agreement.

83.

Hathcock claims that he was self-employed and an independent contractor.

84.

As an independent contractor, however, Hathcock owed FICA and Medicare, as well as income taxes.

85.

Moreover, the cost of duplicating benefits, such as

workers compensation, SUTA, FUTA and the value of 401(k) contributions, when coupled with monies due by independent contractors for FICA, Medicare and income taxes, exceeds the monies actually deducted from Hathcock's rental and employee paychecks.

III. JUDGES HITTNER, JOLLY, SMITH AND WIENER CORRECTLY HELD THAT THE AGREEMENT DID NOT CONTAIN *CONTRA BONOS MORES* PROVISIONS.

A. Introduction.

Hathcock did not dispute Statement of Material Fact Nos. 4, 5, 11-14, 56, 80, 81 and 82. These statements and Coatney Affidavit (No. 2)[2] show that Acme paid in full FICA and FUTA to the federal government and SUTA to state governments.

These statements also show that Acme issued all lessors (including Hathcock) a rental check to compensate them for the use of their vehicles, and that Acme issued all drivers (including Hathcock) a paycheck to compensate them for driving vehicles.

These statements, moreover, show that Acme did not pass along to **employees** any of the costs of driver employment. These statements finally show that Acme passed along **some** of

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[2] Coatney Affidavit No. 2 was submitted along with "Acme Truck Line, Inc.'s Response to Plaintiff's 'Factual Basis' that Allegedly Supports his Motion for Summary Judgment."

the costs of driver employment to truck suppliers, *i.e.*, **lessors** such as Hathcock.

B. The Statutes on Which Hathcock Relies Address Or Relate to Wages and Not Rental Revenues.

Hathcock cites to the provisions calling for payment of FICA and Medicare taxes at p. 3 of his Petition. For example, he represents that employers are required to pay a portion (½), and that employees are required to pay the other half. *See* 26 U.S.C. § 3111(a) and (b).[3] Hathcock, however, does not

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[3] Hathcock does not claim that he has a private cause of action under the Social Security Act, and for good reason. He does not. *See Salazar v. Brown*, 940 F.Supp. 160, 164 (W.D. Mich. 1996); *Spilky v. Helphand*, 1993 WL 159944 at p. 2 (S.D. N.Y. 1993).

Nor is there an implied private cause of action where an employer does not comply with its FICA obligations. *See, e.g., McElwee v. Wharton*, 19 F.Supp.2d 766, 770 (W.D. Mich. 1998) (holding remedy of restitution is not available); *Salazar*, 940 F.Supp. at 164-65; *Spilky*, 1993 WL at pp. 2-3; *Digiovanni v. City of Rochester*, 680 F.Supp. 80, 82-83 (W.D. N.Y. 1988). *See also Deleu v. Scaife*, 775 F.Supp. 712, 716 (S.D. N.Y. 1991) (granting defendant's unopposed motion to dismiss FICA and FUTA claims finding that "Congress [did not intend] to imply a private remedy for violation of these sections of federal tax law").

While Acme is not ethically required to bring contrary authority to the attention of this Court, two district court judges have reached a different conclusion. *See Sanchez v. Overmeyer*, 845 F.Supp. 1178 (S.D. Ohio 1993); *Ford v. Troyer*, 25 F.Supp.2d 723 (E.D. La. 1998). Acme submits that these decisions are not sound.

Regardless, none of these cases involve situations where the employer withheld the employer and employee portions of FICA and, thus, all taxes had been paid. POINT: Even *Sanchez* and *Troyer* do not support Hathcock's claim herein.

contend that these taxes were not paid, and for good reason. They were.

At p. 11 of the Petition, Hathcock cites provisions prohibiting assignments, attachments and garnishments of Social Security benefits (42 U.S.C. §407), even though there are no allegations, much less facts, showing the applicability of 42 U.S.C. §407.

Hathcock also cites 26 U.S.C. §3301which imposes an unemployment tax on employers. There are, however, neither allegations nor facts showing that Acme did not pay all FUTA sums due.

Hathcock further cites provisions requiring Texas employers to pay an unemployment compensation tax based on a percentage of "**wages for employment** paid during a calendar year . . ." (Tex. Labor Code §204.002(a) (emphasis added)) and prohibiting employers from "deduct[ing] any part of [said] contributions from the **wages** of an individual in the employer's employ." Tex. Labor Code §204.003 (emphasis added).[4] *See also* Texas Labor Code 207.073 (same). Again, however, Hathcock cannot point to any evidence showing that Acme failed to pay all SUTA due or that Acme recouped said costs from its **employees**.

Moreover, Hathcock cites La. R.S. 23:1531, which prohibits employers from recouping their SUTA contributions from wages, and La. R.S. 23:532, which sets forth the amount

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[4] Private causes of action are not specifically authorized for violations of this statute and Hathcock has never claimed that one exists.

of the tax. Again, there are no facts supporting an allegation that Acme did not pay SUTA or reduced Hathcock's or anyone else's **wages** to cover its liability for SUTA.

Finally, Hathcock cites §§207.071-73 of the Texas Labor Code that prohibit employers from agreeing to employ persons provided that they agree not to seek unemployment compensation benefits. However, there are no allegations or facts showing the applicability of said provisions herein.

C. Acme Did Not and Has Not Deducted Sums Representing SUTA or FUTA Contributions, Workers Compensation Premiums and/or FICA from the Wages of Hathcock or Any Other Driver.

1. Wages include monies for driving a truck.

Wages are defined as "all remuneration for personal services." Tex. Labor Code Ann. §201.181. Personal services are those "rendered by the claimant personally." *Tenneco v. Padre Drilling Co.*, 453 S.W.2d 814, 819 (Tex. 1970). *See also Fontenot v. Trans Gulf, Inc.*, 664 So.2d 1238, 1248 (La.App. 1st Cir. 1995) (stating that "wages means the amount earned by the employee through his own labor, rather than profits for his enterprising or rental for any equipment he may provide . . .").

Hathcock, for some reason, fails to cite the provisions in the Louisiana Revised Statutes stating that "[e]mployment,

for purposes of unemployment insurance coverage, is employment of workers who work for **wages** . . ." La. R.S. 23:1472(19)(b) (Emphasis added).[5]

2. Wages do not include consideration paid pursuant to a vehicle lease.

Acme compensated lessors for leasing vehicles with one check and paid employees for driving vehicles with another check. Disputes have occasionally arisen over the proper allocation or characterization of wages and rent.

Courts have addressed the proper allocation or characterization of wages v. rent in the context of the amount of benefits due employees who suffer on-the-job injuries when they also lease equipment to their employers. Courts have unanimously concluded that the computation of workers compensation benefits due **employees** does **not** include sums paid for leasing equipment, as said sums do not constitute wages. *E.g., Brown v. Vernon Sawyer, Inc.*, 645 So.2d 260, 263-64 (La.App. 2d Cir. 1994) (basing computation of benefits on gross receipts of each load hauled, with rest representing compensation for the lease of claimant's truck);[6] *Backaus v. Murphy Motor Freight Lines*, 442 N.W.2d 326, 327 (Minn.

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[5] Private causes of action are not specifically authorized for purported violations of Louisiana's Unemployment Compensation Act and Hathcock has never claimed that one exists.

[6] The *Vernon Sawyer* court used 20% concluding same was the industry standard. Lessors set driver wages at Acme within a range of 10% to 23% of each load hauled.

1989) (stating that "[w]ages are compensation for labor and services . . . reflect the worker's ability to earn . . . [and do not] include . . . the income from capital equipment . . ."). *Cf. Delno v. Celebreeze*, 347 F.2d 159 (9th Cir. 1965) (discussing differences between remuneration or wages, which are includable in determining amount due, and rental income derived from capital investments, which are not).

Rental revenues are **not** wages. The operation of ¶3 of the Lease, about which Hathcock complains, reduced rental revenues and not **wages**. The statutes on which Hathcock relies, therefore, do not void the provisions of ¶3 of the Lease.

3. Hathcock's inability to distinguish his dual capacity is, to the extent that it is not already clear, discernible by Acme's consistent treatment of all lessors.

Acme has leases with both natural and artificial persons. Some natural and artificial persons own more than one truck and do not drive any of them. Some natural and artificial lessors own numerous trucks and drive only one of them. Some natural and artificial lessors own only one truck and drive it.

Regardless, Acme treats all lessors alike. Pursuant to ¶3 of the Lease Agreement, lessors receive 70% of earned revenues less driver wages and 23% of driver wages in order to

cover some of the costs of driver employment.[7]

That Acme has not violated laws prohibiting deduction from wages for FUTA and SUTA can be gleaned from the following examples.

Lee Trucking Corporation owns and leases eight trucks to Acme. Ronnie Lee does not drive any of them. Rather, at least eight others drive them.

Acme deducts wages paid to those who drive Lee Trucking's vehicles from Lee Trucking's rental checks, pursuant to ¶3 of the Lease. Acme also withholds 23% of wages paid to those who drive Lee Trucking's vehicles from Lee Trucking's rental checks.

If one subscribes to Hathcock's theory of the case, Acme has withheld FUTA, SUTA, FICA and workers compensation premiums from the wages of Ronnie Lee. This, however, is plainly incorrect. Ronnie Lee does not drive; therefore, he does not receive **wages** or **wage checks**.

Likewise, Acme has not deducted or withheld SUTA, FUTA, FICA or workers compensation premiums from the paychecks of those who drive Lee Trucking's eight trucks. Rather, Acme has passed along some of those costs to the lessor, Lee Trucking. This does not constitute a violation of the statutes on which Hathcock relies, as those sums have **not**

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[7] Paragraph 3 of the Lease contains other provisions that reduce rent.

been deducted from the paychecks (wages) of the drivers.[8]

Another dual capacity example involves James G. Rakowitz. He leased five trucks to Acme. Unlike Ronnie Lee, however, he drove one of them.

Mrs. Rakowitz sued Acme's workers compensation insurance carrier seeking workers compensation benefits, after he was killed, while driving to obtain a replacement part for one of the leased vehicles on a day that he was not scheduled by Acme to drive. The Texas Workers Compensation Commission in *Rakowitz v. Zurich American Ins. Co.*, Docket No. SA/98-107023-/01-CC-5A45, denied her claim holding that he was acting in his capacity as lessor, with responsibility to repair the leased vehicle, rather than as an employee at the time of his death. *See* R. at 898-94.

The *Rakowitz* decision clearly recognized that individuals could be both lessors and drivers (employees). The *Rakowitz* decision also demonstrates that worker compensation benefits are only available to one acting in his capacity as an employee at the time of the accident.

Application of the *Rakowitz* decision herein shows that the statutes on which Hathcock relies do not apply when he received rental checks for leasing rather than wages for driving.

Therefore, when Acme passed along some of the costs

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[8] Statement of Material Fact No. 22 evinces dual capacity. Under Hathcock's theory of the case, Acme could not discharge a driver (employee) while maintaining the Lease Agreement with the driver (lessor). But, it has.

of driver employment to its **lessors**, it did **not** violate laws prohibiting it from passing along FUTA and SUTA taxes to its **employees**.

4. Summary: A refutation of specific statements in the Petition.

Hathcock, at p. 10, calls the Fifth Circuit opinion "erroneous" and adds that "[t]he wrong is compounded because the **employee** pays both sides of the tax . . ." (emphasis added). At p. 11, Hathcock argues that "Congress intended for the employer to pay its share without reimbursement from the **employee**" (emphasis added).

These arguments deliberately distort facts. Hathcock was not just an employee; he was also a lessor. Hathcock refuses to admit that he leased something of substantial value, was compensated under the Lease Agreement therefor, and that the deductions about which he complains herein reduced his **rental revenue** under the Lease Agreement and did not reduce his **wages**.

At p. 11, Hathcock somehow contends that his FICA, FUTA and SUTA benefits are adversely affected. This represents another distortion of the facts. Acme has **undisputedly** paid all of the FICA, FUTA and SUTA taxes that it owed and owes. Hathcock is eligible to receive benefits to which he is entitled under these statutes. That Hathcock may have received less money under the Agreement for the lease of his truck is irrelevant and unrelated to the amount of FICA,

FUTA and SUTA he might receive one day as a result of his **wage** earnings[9] as opposed to receipt of **rental revenues**.

At p. 11, Hathcock further asserts that Acme is obtaining reimbursement of its FICA, FUTA and SUTA obligations "from **Hathcock, its employee**" (emphasis added). This is again a plain distortion of the facts. The dispute herein involves the amount of **rent** that Hathcock claims he should have received and not the amount of **wages** that Hathcock received.

At p. 11 of the Petition, Hathcock characterizes the facts as follows: "Hathcock is Acme's **employee** when being paid for driving his truck but not when being paid for allowing Acme to allow him to use his truck." That Hathcock must go to such extreme length to mischaracterize **facts** is indicative of the meritlessness of his Petition. Why can't Hathcock just admit that he leased his truck to Acme and that Acme paid him rent therefor under the Agreement? Answer: A fair characterization of the payment dispositively undermines his Petition.

At p. 14, Hathcock attempts to confuse the relationship between the parties. More specifically, the Petition states that "Acme is also illegally shifting the imposition of this tax to Hathcock. Hathcock similarly has no liability for FUTA taxes and hence the deductions are patently and purposefully unlawful." Here, Hathcock merges the concepts of employee

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[9] Hathcock, as lessor, chose to pay the driver (employee) 10%. He could have chosen as much as 25%. Hathcock, therefore, chose to pay less money into his Social Security account.

and lessor into just employee, again ignoring that Acme was paying Hathcock rent for the lease of his truck under the Lease Agreement. *See also* pp. 21-24, *infra* (Hathcock's interpretation is radical and so very, very wrong).

D. Hathcock's Contention that Acme Has Illegally Shifted Its Tax Burden Is Radical, Very, Very Wrong, and Legally Unsupported.

Hathcock cannot show that Acme recouped any monies representing its FICA, FUTA and/or SUTA obligations from its employees, because Acme **in fact did not**.

Hathcock, therefore, argues that Acme has violated the spirit of said statutes. In order to contend that Acme has violated even the spirit of the law, Hathcock argues that only the employers can pay the taxes.

Acme, however, has undisputedly paid the taxes. Hathcock, therefore, incredibly argues that Acme cannot recoup monies to cover these taxes not only from employees, but also from customers, lessors, or anyone else.

Hathcock's argument is economically radical, totally alien and so very, very wrong.

Every company **can** and **must** cover its overhead or it will go out of business. Assume for purposes of simplicity and clarity that Edsel Motors employs 10,000 persons and that it paid $1,000,000 in salaries in 1998. Assume that Edsel's FICA, FUTA and SUTA costs in 1998 were 23% of salaries or

$230,000. Assume further that Edsel paid $1,000,000 to suppliers in 1998 and that it received $2,645,500[10] for cars which it manufactured and sold.

Edsel has, in this example, made a 15% profit by not only recouping from its consumers the cost of salaries, FICA, FUTA and supplies, but also another $415,500. While Hathcock argues that employers cannot pass along their FICA, FUTA and SUTA obligations to any third party (including consumers), he offers no legal support for the contention and he is just wrong. This is not illegal.

Now assume a slightly different set of facts. Again assume that Edsel employed 10,000 persons, but that its salaries and benefit costs increased by 10% in 1999 so that it paid $1,100,000 in salaries and $253,000 in FICA, FUTA and SUTA. Assume that Edsel knew that it would receive $2,645,500 for cars which it manufactured and sold in 1999 because competition prevented it from passing along these increases to consumers. As a result, assume that Edsel notified its suppliers that it would decrease payments by $123,000 to cover increases in salaries, FICA, FUTA and SUTA. Edsel, therefore, maintained its 15% profit in 1999 because it paid just $897,000, rather than $1,000,000, to suppliers in 1999.

Under Hathcock's legal theory, Edsel has illegally passed along to a third person costs which only it **can** and **must** pay. Suppliers refer to demands to cut costs as "squeezing."

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[10] $2,645,000 represents 115% times $2,300,000. Stated differently, it represents a 15% profit. For purposes of this example, numerous other costs of doing business, such as marketing, utilities, workers compensation, etc., are not included.

Squeezing occurs frequently in our economy.[11] Even though, under this simplistic example, Edsel recoups its increased FICA, FUTA and SUTA costs from its suppliers rather than its customers (consumers), it is not illegal and Hathcock offers no authority whatsoever — analogous, direct or otherwise — that it is.

Here, Acme passes along some of the costs of driver employment to its lessors, *i.e.*, those who supply its trucks. Even if Acme had passed along all of its FICA, FUTA, SUTA and worker compensation costs to its truck suppliers, *i.e.*, lessors, its conduct would be no more illegal than Edsel in either of the aforementioned examples.

Nevertheless, for further clarification, assume that Edsel just informed its suppliers that it would reduce payment by $123,000. That is, Edsel did not state that it was doing so in order to cover increases in salaries and employment taxes. Would anyone, other than perhaps Hathcock, contend that such action was illegal? Of course not.

Likewise, suppose Acme had notified its lessors that it would, in the future, pay only 58% of each haul and did not specify that the 12% reduction was to cover some of the costs of driver employment. That is, Acme did not explicitly state that it was reducing payments under the Lease from 70% to 58% in order to recoup driver wages and 23% of driver wages

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[11] Acme submitted eleven articles from the Wall Street Journal and other newspapers to Judges Hittner, Jolly, Smith and Weiner in support of this statement below.

to cover some of the costs of driver employment.[12]

Hathcock's theory of the case would not void such a lease. Acme, therefore, could reduce rental payments to lessors from 70% to 58% without violating the law. Yet, Hathcock argues herein that the Lease, which has the identical economic impact, is illegal.

Hathcock is plain wrong when he argues that Acme cannot pass along some of the costs of driver employment to its suppliers, *i.e.*, its **lessors**. Acme just **cannot** pass along some of the costs of employment to its **employees**.

The decisions of Judges Hittner, Jolly, Smith and Wiener were correct. Therefore, there is no reason to grant Hathcock's Petition.

E. The Infirmity of Hathcock's Legal Position Is Exemplified by the Absence of Legal Support Therefor and a Meritless "Parade of Horribles."

1. The absence of legal support.

Acme's Motion for Summary Judgment herein was filed on May 31, 2000. Judge Hittner summarily dismissed the Complaint on July 14, 2000. Hathcock then sought

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[12] Acme pays lessors 70% of each haul less driver wages and 23% of driver wages. Hathcock set his driver wages at 10% of each haul. Therefore, on a haul of $1,000, Hathcock as lessor would receive $700 less $100 less $23 or $577.

reconsideration. Judge Hittner denied Hathcock's Motion for Reconsideration on August 29, 2000. Judges Jolly, Smith and Wiener affirmed Judge Hittner's opinion on September 6, 2001 and denied Hathcock's Petition for Panel Rehearing on October 3, 2001.

Between May 31, 2000 and October 2001, Hathcock was unable to find any case that even remotely supported his position herein. For example, Hathcock submitted the decisions in *Gardner v. Ewing*, 88 F.Supp. 315 (S.D. Ohio 1950), *aff'd*, 185 F.2d 781 (6th Cir. 1950), *aff'd*, 341 U.S. 321 (1951);[13] *Hospital Resource Personnel, Inc. v. U.S.*, 68 F.3d

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[13] There, Charles Warner applied for benefits, but died prior to furnishing proof of his age. Lump-sum death benefits but not primary insurance benefits were awarded, based on a finding that Warner had abandoned his claim for primary insurance benefits. Gardner, the executor of the estate of Charles Warner, then supplied proof of age and eligibility and sued Oscar Ewing, the Federal Security Administrator, seeking benefits.

The court held that the estate was entitled to receive the primary insurance benefits because Warner was an insured who had reached age 65 and who had applied for primary insurance benefits. That is, his benefits vested as of the time he complied with the aforementioned criteria.

The court next addressed defendant's contention that §407(a) prevented the transfer of benefits from Warner to his estate representative. The court rejected this contention, holding that "Congress intended to prohibit voluntary alienation by the wage-earner, nothing more." *Gardner*, 88 F.Supp. at 323.

Hathcock is 51 years old and has never applied for social security benefits. There is no evidence that Hathcock has sought to transfer benefits to any third person. There is certainly no evidence that Acme has somehow sought to transfer Hathcock's benefits to itself or any third person. Section 407(a) and the *Gardner* decision, accordingly, afford no support whatsoever for the proposition that the facts herein constitute a prohibited waiver, assignment or transfer.

421 (11th Cir. 1995);[14] *Phillips v. Phillips*, 820 S.W.2d 785 (Tex. 1991);[15] *Reef v. Mills Novelty Co.*, 89 S.W.2d 210 (Tex. App. 1936);[16] and *United States v. Pomponio*, 528 F.2d 247

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[14] In *Hospital Resources*, the government assessed Hospital Resource about $1,144,000 for unpaid employment taxes. The taxpayer (Hospital Resource) paid and sued seeking a refund contending that it did not owe any employment taxes because its nurses were independent contractors. The court agreed and ordered a refund. *Hospital Resource*, 68 F.3d at 428-29.

[15] In *Phillips*, former spouses, Harry and Martha Phillips, created a partnership to hold their oil and gas interests rather than break same apart when they divorced. Harry Phillips was named the general or managing partner in an agreement which also required him to pay his former spouse ten times actual damages for breaches of trust. When he did not distribute all sums due, she sued to dissolve the partnership and for damages including the stipulated ten times actual damages.

A jury awarded her actual damages. The trial, appellate and Supreme Court however, rejected her stipulated or liquidated damages claim because the stipulated damages provisions contained in the partnership agreement contravened Texas law prohibiting penalty clauses. *Phillips*, 820 S.W.2d at 788-89.

[16] In *Mills Novelty*, B.B. Moseley, an employee of Mills Novelty, assigned commissions due him to Fred Reef. Mills Novelty refused to recognize the assignment based on its contract with Reef prohibiting assignments without its consent. Mills Novelty, accordingly, paid all sums due to Moseley and Reef sued Mills Novelty claiming that Mills Novelty should have paid him.

The *Mills Novelty* court recognized that parties could not contract away a third-party's right to garnish monies. It, however, also acknowledged that parties were free to contract so long as statutes were not infringed. The *Mills Novelty* Court then rejected Reef's claim holding that the contract did not infringe upon any statutory prohibition. *Mills Novelty*, 89 S.W.2d at 241.

(4th Cir. 1975), *rev'd and remanded*, 429 U.S. 10 (1976),[17] to Judge Hittner in support of his argument herein. There is a reason why he did not cite these cases in his Fifth Circuit Briefs and in his Petition herein.

In the Fifth Circuit, Hathcock did not cite even one decision that supported his argument. Now he proffers the decision in *In re Richardson Dinner Theater, Inc.*, 421 F.Supp. 423 (N.D. Tex. 1976). His reliance on the *Richardson Dinner Theater* decision herein is plainly misplaced and just underscores the lack of authority in support of his position.

The court in *Richardson Dinner Theater* did not address the validity or propriety of a lease agreement or anything remotely close or related thereto. Rather, the court resolved the order (priority) of Social Security taxes due by the bankrupt where the estate was so lean that no claims beyond the second priority received assets. More specifically, the *Richardson Dinner Theater* court had to decide whether FICA taxes generated by wages, earned before the date of the bankruptcy but paid after the bankruptcy, would be given a priority one, two or four. Hathcock quotes from that part of the decision

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[17] There, three brothers were charged with filing false income tax returns. The charges stemmed out of their control of a corporation. More specifically, they reported dividends, on which they owed taxes, as loans and deducted losses on their personal returns which belonged to the corporation. The issue on appeal was whether the jury, which convicted them, was properly instructed on defendants' alleged good faith beliefs.

Here, Acme has never been charged with submission of false tax returns and no wonder. It has paid all monies due and has passed IRS audits.

rejecting assignment of a priority two (wages) to the FICA taxes:

> Third, the benefit argument — that it is not unjust to make the employee pay this tax because of its important social purpose to benefit the employee — flies in the face of the statutory intent that the employee should only partially finance the benefits of this system. Inclusion as wages makes the employee pay his employer's share of this tax.

In re Richardson Dinner Theater, 421 F.Supp. at 425-26.

"I may not be right, but I'm adamant" seems to be Hathcock's battle cry. Hathcock was an employee **and a lessor**. Acme paid Hathcock a **wage** for driving his truck and **rental** for the lease of his truck. Hathcock continues to ignore the facts. Judges Hittner, Jolly, Smith and Wiener did not ignore these dispositive facts and neither should this Court.

2. Hathcock's parade of horribles.

Unable to locate any jurisprudence applying the statutes on which he relies to lessors/suppliers, Hathcock submits a hypothetical in an effort to show that a reduction of monies paid to suppliers is illegal. More specifically, Hathcock hypothesizes at p. 10 of the Petition that employers will lease pencils, desks, shoes, etc. from a person for some unspecified sum, then employ the person, and then pass along some of the costs of employment to the lessor/supplier.

Hathcock cites no real world examples of this practice. And for good reason. He cannot.[18]

There are companies who employ some persons and who have an independent contractor relationship with others. Supplying one's own equipment is an indicia of an independent contractor relationship.

Hathcock's inability to locate even remote support for his argument and to provide a realistic hypothetical just underscores the radicalness and meritlessness of his position. It also demonstrates that the decisions of Judges Hittner, Jolly, Smith and Wiener were correct and that his Petition should be denied.

CONCLUSION

Hathcock seems to primarily ask for Supreme Court review due to the pendency of other cases. He fears that the decision by the Fifth Circuit will have precedential value and result in the dismissal of these other cases.[19]

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[18] Rent in this example would have to be nominal given the ability of companies to outright buy such goods for 10¢ to $20. FICA, FUTA and SUTA costs, however, exceed $20. Hathcock's example obliviously assumes that the individual would, nevertheless, contract at a loss.

Trucks are far more valuable than pencils or hammers. Unlike pencils and hammers, companies lease vehicles.

[19] Hathcock cites the pendency of five cases at pp. 9-10 of his Petition. He omits disclosure of the fact that he was represented at trial by Gallagher, Young, Lewis, Hampton, Downey & Kim and Williams Bailey Law Firm. He omits disclosure of the fact that these firms represent the plaintiffs in those cases, that a Texas Court of Appeals was set to affirm

The decisions of Judges Hittner, Jolly, Smith and Wiener were undisputedly correct. They are, accordingly, entitled to precedential value.

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the summary dismissal of *Evans v. Dynasty* based on the Fifth Circuit decision herein in *Hathcock*, and that to avoid dismissal, Mr. Evans' attorney stated that Hathcock would file a Petition for Writ of Certiorari.